THE

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Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Indian Appeals:

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

REPORTED BY HERBERT COWELL, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

The East Indies.

RAJAH HURRONATH ROY BAHADOOR . PLAINTIFF;

AND

RUNDHIR SINGH AND OTHERS . . . . . DEFENDANTS.

J. C.*
1890
Nov. 19, 20.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Principal and Agent—Liability of Agent—Loan to Hindu Widow—Charge on the Husband's Estate—Rate of Interest.

In a suit to enforce a charge on the estate of the deceased for moneys advanced by the Plantiff to pay Government revenue, maintenance of the widow and deb-sheba, *held* that he was bound to give credit for moneys received by his agent as ijara rent thereof, such moneys having been under his control and applicable to the reduction of debt for which the estate was liable.

Hunoomanpershad Panday v. *Mussumat Bahooee Munraj Koonweree* (6 Moore, Ind. Ap. Ca. 393) followed.

Where a widow has borrowed under necessity, the stipulated rate of interest may be reduced if it was unreasonable for the lender to suppose that she could not have borrowed at a lower rate under the circumstances.

APPEAL from a decree of the High Court (March 24, 1886) varying a decree of the Subordinate Judge of *Rajshahye* (August 28, 1882).

Shama Soondari Bai, the first Defendant in the original suit, was the widow and heiress of one *Gobind Pershad*. The second

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

J. C. 1890

RAJAH HURRONATH ROY BAHADOOR v. RUNDHIR SINGH

Defendant, *Radhika Pershad Singh*, was a minor, who was adopted by the first Defendant after her husband's death. The Plaintiff, *Rajah Hurronath Roy Chowdhry*, sued on the 9th of September, 1881, to recover a large sum of money, which he had advanced to her from time to time, and which, except as to a very small portion of the claim, was secured by mortgages upon her husband's property granted by the first Defendant. The Subordinate Judge found that the whole amount claimed was due and payable by the first Defendant, and decreed against her for that amount less a sum of Rs.10,000, as to which he held that she had established a set-off. He dismissed the suit as against the minor, being of opinion that as against him the Plaintiff had not made out that the loans were binding on the estate. Pending the appeal preferred by the Plaintiff, the first Defendant died, and the adoption of the second Defendant was declared invalid. On the appeal accordingly the Respondent *Romanath Sen* was admitted as the proper party to represent the estate of *Gobind Pershad*. The question before the High Court was whether the transactions between the Plaintiff and the first Defendant were binding on the estate in the hands of the reversioners. The High Court, disagreeing with the Subordinate Judge, held that about half of the claim was binding, and, agreeing with him, held that this amount must be reduced by the set-off of Rs.10,000. For the balance they decreed in his favour, reducing the interest claimed up to suit from 18 to 12 per cent. Against this decree the Plaintiff appealed. Except as regards interest, the questions raised were purely questions of fact. As to the set-off, the judgments of the Courts below were concurrent.

The amount decreed by the Subordinate Judge to the Appellant was Rs.28,837 less Rs.7761, his opinion being that *Shamachurn Roy*, the *Rajah's* principal agent at *Rampore*, had realized not less than Rs 10,000 as rent due to *Shama Soondari*, of which amount the widow had only received Rs.2239.

The High Court held that *Shama Soondari* was shewn to have been in considerable difficulties, "which must have led her to seek the help of the Plaintiff," and that the pressure on the estate was not caused by any misconduct to which the Appellant was a party. They held the estate to be chargeable for all

advances made for expenses of litigation, deb-sheba and personal maintenance, and Government revenue. They decreed to the Appellant Rs.12,418 as paid for Government revenue, and Rs.2239 admittedly paid for deb-sheba and maintenance. With regard to other items, the High Court was of opinion that it was not proved that they reached *Shama Soondari's* hands; that it was the Appellant's duty to have produced his accounts, to have proved them in proper manner, and to have given independent evidence that the sums of money said to have been paid for those purposes were actually required and actually paid.

The High Court was also of opinion that the Rs.10,000 received by *Shamachurn Roy* should be deducted from the Rs.14,657 13*a.* 6*p.*, for which amount they held the estate liable, decreeing finally a sum of Rs.4657 13*a.* 6*p.* with interest, not at the stipulated rate, but at 12 per cent. on the several sums as they were advanced from time to time up to date of decree, and 6 per cent. on the total amount from date of decree until realization thereof.

C. W. Arathoon, for the Appellant, contended that the whole amount claimed should have been decreed against the estate. Such a decree was justified by the finding that it was necessary for the widow to borrow, and the further finding that the consideration money stated in the bonds had been actually advanced. The burden of proof lay on the Defendants to shew that the whole amount claimed was not expended and not advanced for the benefit of the estate. The Appellant was not liable for the rents received by *Shamachurn Roy* from the widow's agents under her instructions, and applied, so far at least as the Appellant was aware, to her purposes. [Reference was made to *Hunoomanpershad Panday* v. *Mussumat Babooee Munraj Koonweree* (1).]

Mayne, for the Respondent *Romanath Sen*, was not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK :—

Their Lordships are of opinion that the judgment of the High Court is correct, and that it ought to be affirmed.

(1) 6 Moore, Ind. Ap. Ca. 424.

J. C. 1890

RAJAH HURRONATH ROY BAHADOOR v. RUNDHIR SINGH.

The learned Judges of the High Court in delivering their judgment, say: "The question arises, Which are the particular sums of money in respect to which the Plaintiff is entitled to any charge upon the estate? It is alleged, and the recitals in the bonds are to the effect, that the moneys were borrowed for three purposes: first, litigation expenses; second, maintenance of the widow and deb-sheba; and third, Government revenue." With regard to the litigation expenses, the learned Judges disallow the amount claimed, upon the ground that the Plaintiff has not proved what those litigation expenses were; that he has not properly rendered any accounts of them, and that under those circumstances he is not entitled to a decree in respect of them. As regards the maintenance of the widow and deb-sheba they say: "We cannot say that the Plaintiff was entitled to a decree as against the estate for the sums of money said to have been advanced for maintenance and deb-sheba, except as regards the sum of Rs.2239, which is admitted by the lady in her deposition to have been received by her, and which is proved by *Srinath Dobey* to have been paid for maintenance and deb-sheba expenses. To this extent we think the Plaintiff is entitled to charge the estate." As regards the payment of Government revenue the learned Judges allow Rs.12,418 10*a.* 6*p.*, which is proved in the judgment of the Court to have been paid by the Plaintiff as Government revenue. They thus hold the Plaintiff to be entitled to Rs.14,657 13*a.* 6*p.*, as money which had been paid by him for maintenance and deb-sheba and for Government revenue, the litigation expenses having been disallowed, and their Lordships are of opinion that the High Court rightly so held.

A question then arises whether a sum of Rs.10,000, which has been found by the Courts below to have been received by the Plaintiff's principal man of business on account of the ijara rent, ought to be deducted from the sum of Rs.14,657 13*a.* 6*p.*

Their Lordships think that the Plaintiff ought to have seen that this sum was applied in reduction of the debt for which the estate was liable, and that the judgment of the High Court was right in deducting the whole of that sum, leaving Rs.4657 13*a.* 6*p.* as the proper sum to be allowed to him. It is contended for the Plaintiff that he was not bound to see to the application of

the money. The rule laid down in *Hunoomanpershad Panday's Case* (1), is this: "Their Lordships think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think under such circumstances he is bound to see to the application of the money." But then their Lordships proceed further, and give the reason why he is not bound to see to the application of the money. They say: "The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application." In this case the Plaintiff did have the control and actual application of the money, and having that control and application he was bound to see that the money was properly applied.

There was also a further question relating to interest. The learned Judges of the High Court say: "The bonds stipulate payment of interest at the rate of 18 per cent. per annum. We do not think that the Plaintiff is entitled to this high rate of interest as a charge upon the estate. But we are of opinion that the ends of justice would be quite met by allowing him interest at the rate of 12 per cent. per annum, which is to be calculated upon the several sums of money as they were advanced from time to time up to the date of the decree," and they allow the Plaintiff a total sum of Rs.6194, the sum which they give for interest being the difference between this sum and the above-mentioned sum of Rs.4657 13*a*. 6*p*. It has been said that there is a miscalculation of the interest at the rate of 12 per cent. If there is, the Plaintiff ought to have applied to the High Court to set the figures right, and no doubt they would have been set right. No such application having been made, the decree ought not to be reversed upon this ground.

Then comes the question, Was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the Plaintiff to see whether there was really and fairly a ground of necessity. Was there a necessity to borrow at the rate of 18 per cent.? That is a question to which he ought to

(1) 6 Moore, Ind Ap. Ca. 424.

J. C. 1890 RAJAH HURRONATH ROY BAHADOOR v. RUNDHIR SINGH.

have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent. he ought not to have charged her that rate.

Their Lordships think, therefore, that the High Court were right in not allowing interest as against the estate at a higher rate than 12 per cent.

For these reasons their Lordships think that the decree of the High Court ought to be affirmed; and they will humbly advise Her Majesty to that effect. The Appellant must pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondent *Romanath Sen*: *Wrentmore & Swinhoe.*

J. C.* 1890 Nov. 15.

RAHIMBHOY HIBIBHOY . . . . . DEFENDANT;

AND

TURNER . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Practice—Special Leave—Final Appeal—Civil Procedure Code, s. 595.

Special leave granted to appeal from a decree directing the Defendant to account; such decree being final within the meaning of sect. 595 of the Civil Procedure Code.

THIS was a petition by the above-named Defendant for special leave to appeal from a decree of the High Court (March 17, 1890), and from a decree of *Scott*, J. (Dec. 10, 1888), and an order of the High Court (June 20, 1890).

The judgment of the 10th of December, 1888, dismissed the suit as to Rs.1,12,500, part of the Plaintiff's claim, and decreed that accounts should be taken of all assets of the insolvent estate represented by the Plaintiff received by the Petitioner's *China* firm from the date of the insolvency, and also various accounts of the dealings between the insolvent and the Petitioner's *Bombay* firm. The decree of the 17th of March, 1890, affirmed the Peti-

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

tioner's liability to account, but varied the directions as to the extent and mode of enforcing the same.

The order of the 20th of June, 1890, refused to admit the Petitioner's appeal to Her Majesty in Council, on the ground that the last-dated decree was not final within the meaning of sect. 595 of the Civil Procedure Code. The case is reported in Ind. L. R. 14 Bomb. 408.

Cohen, Q.C., and *Branson*, for the Petitioner, contended that the decree of the High Court was final within the meaning of sect. 595 of the Civil Procedure Code. [They referred to the report of the proceedings in Ind. L. R. 14 Bomb. 408.] [LORD HOBHOUSE:—The decree established your liability to account, which was in dispute. LORD MACNAGHTEN:—"Final decree" in sect. 595 does not mean last decree, but decree determining rights finally.] See *North British Bank* v. *Collins* (1), decided under 48 Geo. 3. c. 151, s. 15. It has been decided that a decree of this kind is not interlocutory: *Shubrook* v. *Tufnell* (2); *Aben Sha Sabit Ali* v. *Cassirao Baba Saheb Holkar* (3); *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang* (4); *Baboo Gopal Lall Thakur* v. *Telakchunder Rai* (5); *Macpherson's* Privy Council Practice, c. 1.

Finlay, Q.C., and *Mayne*, for the Respondent, contended that there was no final decree. The decree would not be final till after the accounts directed had been taken. It is inconvenient that there should be an appeal before the rights of the parties have been actually determined. Though accountability has been decreed, there may be no accounts to be taken, or nothing done on taking them.

Counsel were not heard in reply.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the Defendant desires leave to appeal from the decree of the High Court, and the Court have refused him the

(1) 1 Macq. 369.
(2) 9 Q. B. D. 621.
(3) Ind. L. R. 6 Bomb. 260.
(4) Ibid. 8 Bomb. 548.
(5) 7 Moore's Ind. App. 551.

J. C. 1890

RAHIMBHOY HIBIBHOY v. TURNER.

necessary certificate on the ground that the decree is not a final one within the meaning of sect. 595 of the Civil Procedure Code. This petition is not by way of appeal from the decision of the Court, but it is presented for an exercise of the prerogative right of the Crown to admit an appeal. Although it is not an appeal, it is perhaps a more convenient proceeding than an appeal, because their Lordships can then grant leave on any other ground, if other ground appears for the indulgence that is sought; and if their Lordships find that, in a case in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to be an unsound reason, then they would advise Her Majesty to admit the appeal.

Now, in point of fact, no other ground has been assigned for presenting this petition, and no other ground has been argued here excepting the one ground that the Court below did not take the right view of the word "final" in the Civil Procedure Code. Therefore, to test that point, their Lordships have to look at what was the real question before the Court when this decree was made. The Plaintiff in the suit alleges that the Defendant is accountable to him upon several claims. The Defendant alleges that he has got legal defences to every one of those claims, and that he is not accountable at all. The Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the Defendant must account. It is true that the decree that was made does not declare in terms the liability of the Defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the Defendant on those accounts, the Defendant is bound to pay it. Therefore, the form of the decree is exactly as if it affirmed the liability of the Defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree

against the Defendant in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the Defendant, still the Defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of sect. 595 of the Code. They, therefore, think the case is one in which they should advise Her Majesty that the leave to appeal should be allowed on the usual terms as to security.

J. C. 1890 RAHIMBHOY HIBIBHOY v. TURNER.

Solicitors for Appellant: *Lattey & Hart.*
Solicitors for Respondent: *Payne & Lattey.*

LALA MUDDUN GOPAL LAL . . . . PLAINTIFF;

AND

MUSSUMAT KHIKHINDA KOER . . . DEFENDANT.

J. C.* 1890 Dec. 9, 13.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Hindu Law—Incapacity to Inherit—Deaf and Dumb—Waiver.

Held, reversing the judgment of the High Court on this point, that a clear recognition of a Hindu deaf and dumb brother by his co-sharer, as being entitled to equal rights of inheritance after his incapacity to inherit must have become apparent does not operate to create a new title in him either by way of family arrangement or by virtue of the law of limitation. To create such new title a clear intention to waive the rights accruing from such incapacity must be proved, and will not be inferred from acts which may have been done out of kindness and affection.

APPEAL from a decree of the High Court (Jan. 12, 1887) affirming a decree of the Subordinate Judge of *Mozufferpore* (May 16, 1883).

The facts are stated in the judgment of their Lordships. The suit was brought in November, 1882, by the Appellant, *Muddun Gopal*, as heir of whoever was the last survivor of the three sons of *Kishen Jewan Lal* (named *Kuldip*, *Madhoram*, and *Sadhoram*), to recover that moiety of the estate which it was alleged had

* *Present*:—LORD MACNAGHTEN, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

J. C. 1890

LALA MUDDUN GOPAL LAL v. MUSSUMAT KHIKHINDA KOER.

vested in *Sadhoram*. The Appellant reserved his right to sue for the other moiety which had vested in *Kuldip Narain*. The Subordinate Judge held that *Sadhoram* had been born deaf and dumb, and was disqualified from inheriting. Secondly, that he predeceased *Kuldip*, and therefore the Appellant could not claim through him. Thirdly, that *Biseswar Parshad*, the husband of the Respondent, had taken possession of the whole estate under the tamliknama of *Kuldip* upon *Kuldip's* death in May, 1870, and that therefore the suit was barred.

The High Court remanded the case. They agreed with the lower Court that *Sadhoram* predeceased *Kuldip Narain*, and that he was born deaf and dumb; but they considered that the Plaintiff's suit ought not to be dismissed without giving him an opportunity of proving that even in this altered state of things he was entitled to some relief in respect of the property in dispute. The following issues were framed by consent to be tried by the lower Court:—

"Did the tamliknama come into operation during the lifetime of *Kuldip*, and if so, when?"

"Did *Ram Lochun Koer* waive her right of inheritance, if any, in favour of *Biseswar*?"

"Did any and what title pass by the tamliknama?"

The Subordinate Judge found on the first issue that the tamliknama of *Kuldip Narain* came into operation in the lifetime of *Kuldip Narain*, and before the death of *Sadhoram*.

Secondly, that *Ram Lochun Koer* gave at least an implied assent to the tamliknama, and therefore waived her right to the inheritance.

Thirdly, that on the death of *Kishen Jewan Lal* the whole estate survived to his three sons; that they had succeeded to it not as heirs, but by survivorship, and that at that time it was not discovered that *Sadhoram* would be deaf and dumb. That *Kuldip* must have known of *Sadhoram's* constitutional defects at the date of the suit of *Rajbunsi Koer* (1843), and that, knowing his position and disabilities, he treated him as a co-owner until the date of the ikrarnama of 1856, at which date *Sadhoram* was twenty-three years of age.

That *Kuldip* had, with full knowledge of all the facts, associated

Sadhoram in the ownership of the whole estate, and that by means of *Sadhoram* one-third of the estate had been saved from falling into the hands of *Rajbunsi Koer*, and he held that, under these circumstances, *Kuldip* had by his own acts admitted his brother (*Sadhoram*) into the ownership of the estate, and had created a title in favour of that brother.

As to the effect of the ikrarnama of 1856, he held that, as *Sadhoram* was labouring under a disability, his interest in the joint property could not be disposed of by his mother, who was appointed his guardian for the purposes of a suit (referring to the suit brought by *Rajbunsi Koer*), and who, besides, was a purda Nashin lady, completely in the hands of the person in whose favour the ikrarnama was executed; and, further, that as the act in question was one positively injurious to the minor, it could not have any legal effect.

He found, further, that *Sadhoram* was in joint possession of the estate along with *Kuldip Narain* when the taliknama was made, he being in the position of a joint tenant, and that *Kuldip* could not therefore legally dispose under the Mitakshara law of the whole estate. His finding upon the third issue, therefore, was that the tamliknama passed the share of *Kuldip Narain* in the joint estate to *Biseswar Pershad*, and that that share, in the absence of any particular allegation to the contrary, might be presumed to have been half the entire estate at the date of the gift.

The High Court decided as follows:—

"It is essential that we should see clearly, as far as we can, what the effect of that remand order really was, because on the effect of that order must depend the rights of the parties, on the one side and the other, to raise the contentions which they seek to raise.

"The first thing that seems fairly clear upon that order (and it is confirmed by what the learned pleaders on both sides have told us, their recollections being very closely in accord on the subject), is, that that was an order made by consent, whatever its effect may be. It is an order allowing the Plaintiff to claim some relief, not in respect of any subject-matter other than that for which he had sued, but in respect of the property in dispute,

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that is to say, eight annas of the family estate; and it gave him the right of raising a claim to relief consistent with the findings which the Appellate Court had then affirmed, that is to say, consistent with *Sadhoram* having been incapable of taking by inheritance or survivorship, and having died during the lifetime of *Kuldip*. Then it raises issues with regard to the tamliknama, as to time, and as to what passed under it; and also as regards an alleged waiver by *Ram Lochun Koer*. The case which it was intended to allow the Plaintiff to raise was something relating to 8 annas of the estate; it was some case consistent with the negation of the allegations of *Sadhoram's* power to inherit and of his having survived his brother, and further, some case to which those three issues raised by consent must be relevant. We must understand from that, that what was consented to was that the Plaintiff should be entitled to raise the case which he now has sought to raise, which is this, that although *Sadhoram*, being a deaf and dumb person, could not inherit from his father or from his brother *Madhoram*, yet he did, by the acts of the parties concerned, acquire an interest which may roughly be described, so far as the phrase is applicable in a Mitakshara family, as an 8 annas share in the property, and that share, which the Plaintiff could not claim by direct inheritance from *Sadhoram*, because *Sadhoram* died before his brother, he might yet claim as having been inherited from *Sadhoram* by *Kuldip*, his brother, and from *Kuldip* by the Plaintiff himself.

"We think we must take it that that was the case which, under that consent order, the Plaintiff was allowed to raise and establish if he could. But all the other issues in the case, which had not been disposed of in the first instance by the Appeal Court, are clearly open, and it is our duty to dispose of them now, especially the issue of limitation. The two questions then before us are, first, whether, apart from limitation, the Plaintiff has shewn that such an interest as he now sues for vested in *Sadhoram*, and passed from *Sadhoram* to *Kuldip*, and from *Kuldip* to the Plaintiff; and secondly, if so, is the claim in the present suit barred by limitation.

"As to the first of those questions, the view of the Court below appears to have been in favour of the Plaintiff; and there are

very strong grounds in support of that view. We find that upon the death of the father, *Kishen Jewan Lal*, in 1835, and of *Madhoram* about two years afterwards, the property was registered in the two names of *Kuldip* and *Sadhoram*. We find that in the conveyance of one property, *Mothurapore*, the name of *Sadhoram* appears. We find that all the documents, so far as we have them before us, connected with the property, are executed in the names of two brothers, that is to say, in the earlier stages by *Kuldip* for himself and as guardian for the infant *Sadhoram*. Leases are executed in the same way.

"But there is one particular set of transactions which it is important to look at in addition to those documents, namely, the proceedings which took place in the suit, to which I have already briefly referred, brought by *Rajbunsi Koer*, the widow of *Madhoram*, on the 21st of February, 1843. She claimed to be entitled to one-third of the property as heiress of her husband, and under the deed of compromise, which had been entered into between her on the one hand, and *Kuldip* for himself and as guardian of *Sadhoram* on the other. She alleged, amongst other things, that her husband, *Madhoram*, was separate, not joint. A variety of defences were set up. The suit was defended by *Kuldip* in his own interest, and ultimately by *Sadhoram*, not through him, but through his mother as guardian. The defences set up were substantially the same defences by both parties. Amongst the points raised in that case were these: That this was a joint property of *Kuldip* and *Sadhoram*; that the compromise, which would have had the effect of conveying the property from *Kuldip* and *Sadhoram* to the widow *Rajbunsi Koer*, could not bind the interest of *Sadhoram*, because *Kuldip* was not his proper guardian, and could not do anything with the property of *Sadhoram*; and further, that it was not effective to pass even any part of the interest of *Kuldip*, because *Kuldip* and *Sadhoram*, being members of a joint Mitakshara family, *Kuldip* could not under the law part even with his own interest in the property. In reply to that a point was raised by *Rajbunsi Koer*, the then Plaintiff. She said that that doctrine did not apply in the case, because *Sadhoram*, being deaf and dumb, inherited nothing, and there was, therefore, no joint estate vested in *Kuldip* and

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Sadhoram, so that there was nothing to prevent *Kuldip* from passing his interest. That contention was resisted by the Defendants in that case; and without going into what passed in the lower Court, ultimately in this Court on appeal that suit was dismissed, on the ground that one of two joint members of a Mitakshara family cannot by himself part with even his own interest, such as it is, in the family estate. In other words, that suit was successfully defended by *Kuldip* as well as by *Sadhoram* through his guardian, on a ground to which it was essential that *Sadhoram* should be a shareholder in the estate. This is very strong to shew that they elected to treat the property as being the property of *Kuldip* and *Sadhoram*; and that state of things went on from the death of the father in 1835 down, at any rate, to the year 1856, that is, over twenty years. One or other of two inferences may very fairly be drawn from that. It may be that that course of conduct shews a family arrangement by which the members of the family interested in the estate agreed that this boy *Sadhoram*, although it might be that he was incapable of taking directly by inheritance, should have the same interest in the estate which he would have had if he had not been incapacitated. Or the inference may be drawn, that as for twenty years the parties in actual management of the estate, principally *Kuldip*, asserted over and over again, by registration, in private documents, and in the most deliberate way throughout the course of litigation, that the possession of the estate, in whomsoever it was, and the management were on behalf not of *Kuldip* alone, but of *Kuldip* and *Sadhoram*, the effect was to give a good title to *Sadhoram* jointly with his brother *Kuldip* by virtue of the law of limitation. On either of those grounds the view taken by the lower Court on this question may well be supported, and we should not be inclined to interfere with it.

"But the main question in this case is, whether the suit is barred by limitation. For that purpose it is necessary to refer to later documents. Hitherto we have referred to the earlier documents. In the year 1856, as we have stated, an entirely new course of dealing commenced. Down to that time *Sadhoram*, on the face of the documents, was treated as one of the members

of the family, taking by birth and survivorship in the usual way. But the document executed on the 29th of February, 1856, asserts a wholly different view. It recites all that had gone before, and the history of the family; and it goes on to say that *Sadhoram*, from a very tender age, shewed symptoms of a disease which ultimately disqualified him; that he has now passed his non-age; that, in spite of the care bestowed upon him medically, he has not recovered; that he is now deaf and dumb and also an idiot; that his disease was pronounced to be incurable. Provision is accordingly made for the maintenance on a fairly liberal scale of the young man, and other provisions for the other members of the family; and the bulk of the property, after setting aside certain property dedicated to particular purposes, was to pass wholly to *Kuldip*, to the exclusion of the helpless young man *Sadhoram*. That document was called an ikrarnama, executed by the mother on behalf of and as guardian for *Sadhoram*. But it is obvious, on the face of the document, and from what follows, that it was really a part of an arrangement between her and her eldest son *Kuldip*. What followed upon that document is not very clear; whether any change in actual possession took place or not, is not clear. But it does appear from the proceedings with reference to a subsequent change in the registration in consequence of the next document to which we are about to refer, that some time after the execution of the deed of 1856, properties which had formerly stood on the register in the names of *Kuldip* and *Sadhoram* were registered in the name of *Kuldip* alone.

"The next transaction of importance is the deed executed on the 18th of June, 1867. By that time, as we have already said, *Kuldip* was a widower and an elderly man; he had one daughter, *Ram Lochun Koer*, and she had a son *Biseswar*, who had attained his full age. On the other hand, *Sadhoram*, who, as appears from the previous document of 1856, was at that earlier date married, had in the meantime lost his wife. This document is accordingly executed. It contains a good deal that is difficult to construe, and a good many passages which it is very difficult to reconcile; but it undoubtedly contains language in itself sufficient absolutely to convey the whole 16 annas in the family

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property from *Kuldip*, who alleges, on the face of the deed, that the title was in himself, to his grandson *Biseswar Pershad*. There are passages in the deed which have been very fairly relied upon as tending to shew that the document might have been designed for some narrower purpose than to convey the property. But we think, taking the document as a whole, that it cannot do less than one or other of two things: either convey the property absolutely *in presenti* to *Biseswar Pershad* (and that is the more natural construction of it), or convey to him in some qualified sense during the lifetime of his grandfather, with an absolute gift on the death of his grandfather.

"The former of these constructions is the one which has been adopted by all the parties to this suit from first to last. It is the construction deliberately put upon the document in the plaint, and it is on the basis of that construction that the complaint with reference to this document is grounded. It is the construction which was admitted, as we find in the judgment of the lower Court, by all parties to be the true construction in the Court below; and it is the one which has been adopted by the Court below. We are not prepared to interfere with it. The effect then is, whatever the rights of *Kuldip* may have really been in the year 1867 (and we have given reasons for thinking that, probably down to that time, the legal interest was vested in *Sadhoram* jointly with *Kuldip*), that in 1867 *Kuldip*, claiming to be the sole owner, conveyed to *Biseswar Pershad*, and the conveyance in the clearest and most express terms is not of an 8 annas share but of the whole 16 annas. After the execution of that document we find that the corresponding change of registration followed. The property, which at one time stood in the names of *Kuldip* and *Sadhoram*, and which afterwards stood in the name of *Kuldip* alone, was registered in the name of *Biseswar* alone. It is found, and it is clear on the evidence, that *Kuldip*, who was in the public service and a man apparently of some knowledge of the world, took pains to give all possible publicity to the transaction by calling persons of position together, and making the transfer of property from himself to *Biseswar* known to them. We find that from that time the Government revenue was paid by *Biseswar*, and the rents collected by him, and that

the suits brought in respect of the property were brought by *Biseswar*. In short, all the evidence goes to shew that the abandonment of possession by *Kuldip* and the vesting of possession in *Biseswar* did really take place. That state of things continued down to the death of *Sadhoram* in about 1869 onwards till the death of *Kuldip* in the earlier part of the year 1870, and again onwards till the death of *Biseswar* at a much later period. And from the death of *Biseswar* the possession has been with his widow and heir, and not with his mother. So that from the year 1867 down to the 13th of November, 1882, when the present suit was brought, there is clear evidence of possession in *Biseswar*, and then in his widow, taken by virtue of the deed, which is a deed of conveyance of title.

"It may be that the Appellant is justified in saying, that as against *Sadhoram* limitation would not run. It may be that we ought to take the language of the ikrarnama, and particularly the tamliknama, strictly against *Kuldip* and those claiming under *Kuldip*, and hold that *Sadhoram* was of unsound mind within the meaning of the *Limitation Act*. But supposing that limitation did not run during the lifetime of *Sadhoram*, it certainly ran from the moment of his death. It appears to us that the very latest point of time at which the present cause of action can be placed, is the death of *Sadhoram*, and that is the time at which the plaintiff has placed it in his plaint. From that time, which is in the year 1869, down to the institution of the present suit, is a period which clearly bars the suit. The result is that the suit is barred by limitation."

Doyne and *Branson*, for the Appellant, contended that the cause of action accrued in 1880 on the death of *Ram Lochun Koer*, who was entitled as the daughter and only child of *Kuldip* to hold for her life whatever estate he was possessed of at his death. The limitation applicable was that laid down in Art. 141 of Act XV. of 1877; viz., twelve years which began to run from the death of *Kuldip's* daughter, if *Kuldip* was the survivor of the three brothers. The findings are that co-parcenary interests still subsisted in 1867. *Sadhoram* was jointly interested with *Kuldip* in the estate at the date of the tamliknama. No part of

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Sadhoram's interest passed by the tamliknama, which does not on its true construction purport to convey and was ineffectual to convey any property at all *in presenti* to *Biseswar Pershad.* On *Sadhoram's* death *Kuldip* was legally entitled to the whole. And if *Biseswar* or his widow were in possession, it was by agreement with *Kuldip* and his daughter to hold on their behalf and not adversely to them or to the Appellant who claims in succession to them. A Hindu widow or daughter may assign her estate to whom she pleases without disturbing the order of succession at her death. Consequently the suit was not barred.

Graham, Q.C., and *Mayne,* for the Respondent, contended that there were concurrent findings of fact by the Courts below, and that on those findings the suit was admittedly barred. The Courts were however wrong in law in holding that the conduct of *Kuldip* evinced any intention to create, or that it did in fact create, any new title in *Sadhoram.* His title, if any, was by inheritance. He was, however, disqualified, and was therefore only entitled to maintenance from the time that his malady appeared to be incurable, subject to this, that his right by inheritance revived if and when his disqualification ceased. No intention is shewn on the part of *Kuldip* to waive the rights accruing to him from the heritable incapacity of his brother. Such intention will not be inferred from acts of recognition of his brothers' title which may have proceeded from other motives than the intention imputed. Consequently *Kuldip* was complete owner at the date of the tamliknama. As for the claim that limitation ran from the daughter's death, both Courts find that there was a relinquishment of her estate in favour of the next male reversioner; she assented to the tamliknama. By that means his inheritance was accelerated, with the result that the complete title was in him and that the estate no longer devolved at the daughter's death on the next heirs of the father, but devolved on his own heirs: see *Gunga Pershad Kur* v. *Shumbhoonath Burmun* (1).

Doyne, replied.

(1) 22 Suth. W. R. 393.

1890. Dec. 13. The judgment of their Lordships was delivered by

LORD MACNAGHTEN:—

Kishen Jewan Lal, who seems to have acquired, or succeeded to, considerable property, moveable and immoveable, was the head of a *Hindu* family governed by the Mitakshara law. He died in the year 1835. He left issue three sons, and no more. *Kuldip* was the eldest, and it is upon his acts and conduct that the question in this case mainly turns. The second son was *Madhoram*. He died about a year after his father's death, without issue, leaving a widow named *Rajbunsi*. The third son, *Sadhoram*, was not more than two or three years old when his father died.

Twenty-two years afterwards the position of the family was this:—*Kuldip* was advanced in years. He was apparently a widower, and without issue living, except one daughter, *Ram Lochun*, and one grandson, the son of that daughter, who was named *Biseswar*. *Rajbunsi* was living, and entitled to maintenance under a compromise following litigation and a previous ineffectual compromise. *Sadhoram* was a widower, and childless; but it appears that he had been deaf and dumb from his birth, and it is found that he was incapable of inheriting or succeeding to property according to Hindu law.

In this state of things, on the 18th June, 1867, *Kuldip* executed a document called a tamliknama, stating the deaths of *Sadhoram's* mother and wife, and the particular circumstances which shewed that *Sadhoram*, by reason of his incapacity, had no interest in the property, and making over the whole of the property to *Biseswar*; and *Biseswar* was then publicly invested with possession. *Kuldip* died on the 9th May, 1870, *Sadhoram* having died in the previous year. *Biseswar* died in 1876, without issue, leaving his wife, *Khikhinda*, who is the present Respondent. On *Biseswar's* death she succeeded to the property, and continued to enjoy it, without any interruption from *Biseswar's* mother, *Ram Lochun*, who lived till 1880.

In 1882 the Appellant, *Muddun Gopal*, brought the present suit. By his plaint he made no claim to the estate left by

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Kuldip. He left over that claim, he said, for another occasion. His case was that *Sadhoram* survived *Kuldip*, and that on *Sadhoram's* death *Biseswar* illegally took possession under the tamliknama, and he sued for recovery of possession of the property of *Sadhoram*, whose nearest heir he claimed to be. The Subordinate Court dismissed the suit, having found that *Sadhoram* was incapable of inheriting, and also that he died before *Kuldip*. *Muddun Gopal* appealed to the High Court. The High Court agreed with the Subordinate Court both as to the incapacity of *Sadhoram* and the survivorship of *Kuldip*; but for some reason not very apparent, they seem to have thought that *Muddun Gopal* ought to be permitted to make out his case in some other way if he could; and, accordingly, with the consent of the Respondent, given for some reason which is also not very apparent, they remanded the case to the Subordinate Court, for the trial of certain issues. One of those issues was whether any and what title passed by the tamliknama. Further evidence was taken, and in the result the Subordinate Court held, that though *Sadhoram* was incompetent to take by inheritance he might take by gift, and that *Kuldip*, by recognising him as joint owner after his incapacity must have become apparent, had created a new title in his favour. Both parties took objections to the finding of the Subordinate Court. On the 12th January, 1887, the High Court pronounced final judgment. As to the legal result of *Kuldip's* conduct the High Court were of opinion that it had the effect of giving a new and valid title to *Sadhoram*, either by way of family arrangement or by virtue of the law of limitation. They discussed the effect of the tamliknama, and the effect of *Biseswar's* possession, which they held to have been exclusive; and they came to the conclusion that the law of limitation ran against *Muddun Gopal* from *Sadhoram's* death at the latest, and that the suit was accordingly barred.

Their Lordships are of opinion that the dismissal of the suit may be justified on other, and perhaps sounder, grounds. They are unable to agree with the High Court in thinking that the acts and conduct of *Kuldip* operated to create a new title in *Sadhoram*. Undoubtedly up to the year 1856 *Kuldip* did in every way and on every occasion recognise *Sadhoram* as jointly

interested with him in the family property. Nothing, perhaps, shews this recognition more plainly than the line of defence adopted in the litigation with *Rajbunsi*, in which her claim was defeated by setting up *Sadhoram's* interest. It is also shewn by a deed of conveyance, by a petition for registration, by leases, and other documentary evidence. But nevertheless their Lordships think it would be wrong to hold that *Kuldip's* position was prejudiced by his conduct. *Kuldip* naturally and properly treated his afflicted brother as a member of the family, and entitled to equal rights, until it became absolutely clear that his malady was incurable. Their Lordships think it would not be reasonable, or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended.

Their Lordships are satisfied that there is no ground for supposing that *Kuldip* intended to divest himself of his own property or to waive any rights accruing to him by reason of *Sadhoram's* incapacity; and they are equally clear that there is no principle of law founded on the doctrine of estoppel, or laches, or the law of limitation or otherwise, which compels them to hold that under the circumstances of this case *Kuldip's* acts and conduct had an effect and operation which he could not have intended or contemplated.

Their Lordships, therefore, think that the suit was properly dismissed, and that this appeal ought also to be dismissed, and they will humbly advise Her Majesty accordingly. The Appellant will pay the costs of this appeal.

Solicitors for the Appellant: *T. L. Wilson & Co.*
Solicitor for the Respondent: *S. G. Stevens.*

J. C.* 1891 Jan. 23; Feb. 7.

DOSIBAI . . . . . APPELLANT;

AND

ISHWARDAS JAGJIWANDAS AND ANOTHER RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Landed Tenure—Construction of Jaghiri Grant—Absolute Interest in Jaghir Lands—Practice—Attachment and Sale.

Where a jagheer is granted to a man and his heirs, and there is nothing to control the ordinary meaning of the words, the grantee takes an absolute interest.

Where property is under attachment in execution of a decree for instalments of debt, *held* that it is unnecessary to attach it a second time under a supplemental decree in favour of the same creditor for the balance of the same debt before issuing a warrant to sell in execution of the later decree.

APPEAL from two orders of the High Court (May 9, 1884, and July 7, 1885), whereby an order of the Subordinate Judge of *Surat* (Nov. 15, 1883), directing that a warrant to sell the four jaghiri villages, the subject of this appeal, be issued.

The case in the High Court is reported in Ind. L. R. 9 Bomb. 561.

The grant of the jaghiri villages to the Appellant's predecessor in title is set out in their Lordships' judgment.

The previous correspondence between the Collector of *Surat* and the Government of *Bombay* relating thereto, and a minute of Sir *John Malcolm*, shewed that the grant was made to *Ardesar* for past services, and that a nazarana was, according to the correspondence, stipulated to be paid by *Ardesar's* successors to the Government, though not by himself.

Cowell, for the Appellant, contended that the grant in question was a grant "as jagheer," which expression must be construed by the aid of the contemporaneous correspondence above described.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

The effect was a grant to *Ardesar* and to his successors; but the latter took on condition of making payment of nazarana, the amount of which was left to be ascertained on each occasion when the succession opened by agreement between such successor and the Government. Such a transaction operated as a grant for life only to *Ardesar*, with a right to his heirs in succession to obtain a renewal of the grant. The condition as to nazarana was not expressed in the sanad, but appeared on the face of the correspondence. [Reference was made to *Gulabdas Jugjwandas* v. *Collector of Surat* (1); *Ramchandra* v. *Venkatrao* (2).] The meaning of the grant as jagheer was that the grant was of the Government revenue and not of the soil, to be held according to the usual incidents of jagheer tenure, which imported, as explained in the correspondence and as laid down in 6 Ind. App., a succession of life grants by the Government, subject to resumption on failure of heirs. It lay on the Respondents to shew that the grant was intended to be of an hereditary and alienable estate, by which the Government deprived itself for all time of all interest in the Government revenue of the villages. As regards the right to issue a warrant to sell in pursuance of a decree without attachment under that decree, the practical result was that the judgment creditor would sell not the property out-and-out, as would be the case if he sold under an attachment or under a decree for sale, but a mere equity of redemption. He would sell in satisfaction of the balance of his claim a right to redeem the property in suit on payment of the unsatisfied balance of a former decree for the earlier instalments of the same claim. Such a proceeding was not authorized by the Code or by the law of mortgage, and if an attachment had been issued under the subsequent decree, such a sale could not have been directed. The property should have been attached and sold in such manner as to pass an absolute title to the purchaser. By the course adopted intending purchasers were deterred from bidding, and the Respondents obtained leave to bid on that ground.

Mayne and *Branson*, for the Respondents, were not called on.

(1) Law Rep. 6 Ind. Ap. 54. (2) Ind. L. R. 6 Bomb. 598.

J. C. 1891. Feb. 7. The judgment of their Lordships was delivered by

1891 LORD HOBHOUSE:—

DOSIBAI v. ISHWARDAS JAGJIWANDAS.

There have been a great many proceedings in this suit, and the record is very bulky, but the facts material to the present appeal are few, and the questions short and simple.

On the 24th of November, 1830, the Government of *Bombay* made a grant to one *Ardesar* in the following terms:—

"In consideration of the active and zealous performance of the duties entrusted to him by Government, the Honourable the Governor in Council hereby gives and bestows upon *Ardesar Bahadoor*, son of *Dhunjeesha*, and his heirs for ever as jagheer the following four villages—*Bhestan* and *Sonaree*, in the *Chowrasee* pergunnah, *Kunuara* and *Boreeach*, in the *Chiklee* pergunnah, in the zilla of *Surat*, with the juma and moglaee (1) of the same, now yielding an average net sum of rupees two thousand nine hundred and ninety-two, one quarter and ninety-six reas (2992. 1. 96). The revenue of the said villages hereafter, whether more or less, to be collected by the said *Ardesar Bahadoor* and his heirs, from the 5th June, 1830, and such lawazims or huks as are at present settled on those villages are to be disbursed by the said *Ardesar Bahadoor* in the same manner as heretofore."

Ardesar contracted a large debt, and in the year 1833 he executed a deed giving to his creditor a charge on the four villages. In the year 1847 the debt had increased, and he executed a further charge, coupled with a covenant to pay off the debt by annual instalments. In 1856 he died. The Respondents represent his creditor and mortgagee. The Appellant represents his heir.

In the year 1861 the mortgagee sued the then heirs of *Ardesar*, and obtained a decree, dated the 14th November, 1863, to recover the debt then due, nearly two lacs of rupees, from the four jaghiri villages, and from their income, and from the other properties of *Ardesar*. In pursuance of this decree an attachment

(1) "The moglaee of *Bhestan* is granted in jaghiri to *Moolna Kootboodeen Husseen*, and is consequently not included in this grant. Rupees (525) five hundred and twenty-five."

was obtained, and the four villages have ever since remained under attachment.

In the year 1866 fresh instalments and fresh arrears of interest had accrued due, and the parties, having some dispute as to the correct amount, referred the question to a panch, who on the 3rd December, 1866, made an award ascertaining the amount due. This award was filed in Court on an application made under sect. 526 of the Code, and appears to have been taken as supplemental to the suit of 1861; but no decree was made upon it till the 11th July, 1883, when a decree was passed to the effect that the Respondents (representing the creditor and mortgagee) should recover the amounts then mentioned from the four villages and their revenues, and from all other properties of the deceased *Ardesar*.

In the month of July, 1883, the Respondents applied for a sale under the last decree, without any previous attachment; and they claimed to have the property sold, with a reservation of their right under the first decree of 1863, on which they alleged that there was still due Rs.82,468. It appeared that the four villages were still under attachment in execution of the first decree, and the Appellant stated that she was taking steps to have it removed. The Court granted the application, but directed that a previous notice of thirty days should be given and duly proclaimed. That is the order of which the Appellant complains. On her appeal the High Court supported the Court below; and she now contends that both Courts are wrong, resting her case on three grounds.

The first ground goes to the substance of the Respondents' demand. The Appellant contends that the grant of 1830 did not confer an absolute interest on *Ardesar*, but, being a grant of a jagheer, operated as giving a succession of life interests to him and his heirs for the time being. There is no principle or authority which gives any warrant for such a contention. It is true that when a jagheer is granted in indefinite terms, it is taken to be for the life only of the jagheerdar. But where there is a grant to a man and his heirs, and nothing to control the ordinary meaning of the words, the grantee takes an absolute interest The principle that jagheers are to be

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considered life tenures only, "unless otherwise expressed in the grant," is expressly laid down in the *Bengal* regulations. See Reg. XXXVII. of 1793, s. 15. It is the law also in *Bombay* and other parts of *India*.

The second objection taken by the Appellant is that the order for sale should have been preceded by an attachment. The two Courts below held that, in the case of a decree to enforce a mortgage such as the present one, an attachment is not required, and that the practice is to make an order for sale without one. Their Lordships do not feel called on to go into that. In this case the four villages were under attachment at the suit of the same creditor, and to enforce a portion of the same debt, which had accrued at an earlier period under the same instruments of mortgage. A second order for attachment would be an empty formality, and there is no rule which requires it.

The third objection of the Appellant is that as the sale has been ordered, not of the whole property free from charge, but with a reservation of the Respondents' claim under the first decree, she is damnified, because nobody but the Respondents themselves would bid for a property so situated. This objection was not taken in either of the Courts below.

The reason for the reservation is not apparent, nor indeed is the meaning or the effect of the order quite clear. If the objection had been taken in the First Court on the petition which the Appellant presented to get the order discharged, very possibly it might have been complied with, and certainly its intention would have been placed beyond doubt. Their Lordships would be very reluctant to give effect to an objection of this kind, taken for the first time when the Appellant's case is lodged here, even if it appeared to be of some importance. But it cannot be of any importance. The sale is ordered to realize more than three and a half lacs of rupees, which would exhaust the value of the four villages several times over. The debt is not the debt of the Appellant, nor is she interested in its reduction except for the purposes of getting some surplus out of the villages. As it is practically impossible that there should be any such surplus the question is wholly unsubstantial,

and that may be the reason why it was never raised until the present stage of the proceedings.

Their Lordships hold that the appeal should be dismissed with costs, and they will humbly advise Her Majesty accordingly.

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Solicitors for Appellant: *Barrow & Rogers.*

Solicitors for Respondents: *Payne & Lattey.*

CHUNDRABATI KOERI AND ANOTHER . . PLAINTIFFS;

AND

HARRINGTON . . . . . DEFENDANT.

J. C.* 1890 *Dec.* 18, 19; 1891 *Feb.* 7.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Law of Landed Tenure in Bengal—Right of Occupancy.

In an action of ejectment it appeared that the Defendant was holding over after expiration of a lease granted by the Plaintiffs, but that as to part of the land leased the Defendant had held it continuously for more than twelve years under prior leases for the purpose of cultivating it as a ryot in which there had been no stipulation for re-entry.

Held, that the Defendant had a right of occupancy, and could not be ejected.

Sheo Prokash Misser v. *Ram Sahoy Singh* (8 Beng. L. R. 165) approved.

A right of occupancy cannot be transferred.

APPEAL from a decree of the High Court (June 4, 1888), reversing a decree of the Second Subordinate Judge of *Bhagulpore* (March 31, 1886), and dismissing the Appellants' suit with costs.

The Appellants were zemindars of a separated one-third share of a mouzah, called *Dahia*, in the district of *Bhagulpore*, and the Respondent was the proprietor of the adjacent indigo concern of *Bhagwanpore*.

In 1885 the Appellants filed a plaint, alleging as their ground of action that on the 3rd of July, 1877, they had granted a lease to the Defendant of, with a small reservation, their share of *Dahia*, comprising 89 bighas and some fractions of land, for a term of seven years expiring on the 5th of September, 1884, and that

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, and SIR RICHARD COUCH.

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on the expiration of that term the Defendant, though required to give up possession, refused to do so, and held over. And they asked for a decree for possession of the leased lands, to be demarcated by boundary pillars, in accordance with the maps filed with the plaint, together with mesne profits from the 6th of September, 1884.

The Respondent, by his written statement, admitted the lease and his kabulyut, but as to 34 bighas 3 cottahs 8¾ dhoors, parcel of the land leased, he alleged that for a long time before the grant of the lease from the Plaintiffs in July, 1877, he had been in possession as tenant of 85 bighas of land in the entire of *Dahia*, and had before the year 1278 F, or 1870–1, acquired the right of possession in those 85 bighas, that out of those 85 bighas, 34 bighas 3 cottahs 8¾ dhoors had, under the butwara (or partition made by the Collector in 1874), fallen into the putti, or separate one-third share of the Plaintiffs, and that portion of the land he claimed the right of retaining after the expiration of his lease on his former title as a tenant who had acquired rights of occupancy therein, *i.e.*, he claimed the rights of occupancy given by the 6th section of the *Bengal Landlord and Tenant Procedure Act*, 1869, passed by the *Bengal* Council, or the 20th section of the *Bengal Tenancy Act*, 1885, of the Imperial Legislature, to ryots who should have cultivated lands in a village for a period of twelve years.

The facts and proceedings in the suit are stated in the judgment of their Lordships.

Doyne, for the Appellants, contended that the Respondent had failed to shew that he ever had the rights of occupancy as a ryot which he claimed in answer to this action. Even if it were held that he had derived such rights from the other proprietors of the mouzah before partition, such a grant would not bind the Appellants, who were not parties to it, and who would not be affected thereby as regards the lands subsequently allotted to them on partition. Besides, by taking the lease of the 3rd of July, 1877, the Respondent should be considered as having surrendered to the Appellants such rights as he now claims. It was proved that the Respondent retained possession of the whole of the Appel-

lants' share of *Dahia* after the expiration of the lease in 1884, and were liable to be ejected therefrom. Reference was made to sect. 6 of *Bengal* Act VIII. of 1869, and to sect. 6 of Act X. of 1859.

Cowie, Q.C., and *Branson*, for the Respondent, contended that the Appellants had failed to prove that the Respondent was in possession of any land in suit except that which he claimed as jote, and which has been found to be jote. In that land he had a right of occupancy, and was not liable to be ejected therefrom by the Appellants. For definition of "occupancy," "ryot," see the Acts cited by the Appellants, and compare Act VIII. of 1885, sect. 50—an Act which does not apply to this case, but is a consolidation of the existing rent law. The benefit of the sections relied upon applied to all cultivators who derived their profits directly from the soil. The Defendant no doubt held under leases, but they did not contain any stipulation inconsistent with his acquiring a right of occupancy. [Reference was made to *Kalee Churn Singh* v. *Ameerooddeen* (1); *Pundit Sheo Prokash Misser* v. *Ram Sahoy Singh* (2); *Ranee Shoorut Soondry Debeah* v. *Jardine, Skinner & Co.* (3); *Laidley* v. *Gourgobind Saskar* (4).]

Doyne, replied.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The Plaintiffs in this suit and Appellants in this appeal alleged in their plaint, which asked for recovery of possession and mesne profits, that they are proprietors and zemindars of a third share of mouzah *Dahia*, pergunnah *Naipore*, and that a mostajiri settlement—a lease—of the mouzah, except 3 bighas 14 cottahs of khodkasht land, dated the 3rd of July, 1877, was made by the Plaintiffs and the husband of the first Plaintiff to the Defendant; that at the expiration of the lease the Defendant did not give up possession of the leased share of the mouzah, and

(1) 9 Suth. W. R. 579.
(2) 8 Beng. L. R. 165; S.C. 17 Suth. W. R. 62.
(3) 25 Suth. W. R. 347; and on appeal, Law Rep. 5 Ind. Ap. 164.
(4) Ind. L. R. 11 Calc. 501.

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was forcibly holding possession thereof. The plaint was filed on the 13th of March, 1885, the Defendant being stated therein to be Mr. *T. Poe*.

In the order-sheet in the record of proceedings it appears that on the 17th of April, before the time allowed for filing the Defendant's written statement expired, an order was made on the petition of the Plaintiff that *E. T. Harrington* should be made a Defendant in the place of *A. T. Pugh*, and the plaint be amended accordingly. *A. T. Pugh* is evidently a mistake for *T. Poe*, which is not the only inaccuracy in names in the documents in the suit. This order is not in the proceedings, and the reason for making it does not appear. It could not, however, have been made under sect. 368 of the Code of Civil Procedure, in consequence of the death of *T. Poe*, as in that case a summons would have been issued to *Harrington*, as his representative, to appear and defend the suit, which does not appear in the order-sheet to have been done. Apparently the suit was continued against *Poe* under the name of *Harrington*. *Poe* is the person who is stated in the plaint to be holding possession when it was filed, and is described in the title of it as proprietor of the *Bhugwanpore* concern—meaning the indigo factory. This is material as to the right of occupancy, which is one of the questions in the case. A right of occupancy cannot be transferred, and it is necessary that *Poe* should have been in continuous occupation.

In the written statement of *Harrington*, filed on the 11th of May, the defence set up is "that since a long time the Defendant, as tenant, got possession of 85 bighas of land in mouzah *Dahia* while the aforesaid mouzah was joint. Before 1278 F." —1870—"the Defendant acquired the right of possession in respect of the aforesaid land. Out of the aforesaid land 34 bighas 3 cottahs 8¾ dhoors has under the butwara "—partition—" fallen into the putti "—share—" of the Plaintiffs, and it has been held by the Defendant as tenant after the expiration of the term of lease. The Defendant being a tenant enjoying the right of occupancy is not liable to ejectment." In another written statement of *Harrington*, filed on the 12th of May, the same defence is set up as to the 34, &c., bighas, and it is said that the remaining land is not held by the Defendant. Thus there were two ques-

tions: 1. Whether the Defendant had acquired a right of occupancy in the 34, &c., bighas. 2. Whether the Defendant was in possession of the remaining land. The Lower Court decided both questions in the Plaintiffs' favour. The High Court has reversed the decree, and ordered the suit to be dismissed. Their Lordships have to decide both questions.

As to the first, the evidence is both oral and documentary. The witness *Jowhur Lal*, seventy-three years old, an inhabitant of *Dahia*, and a small shareholder in *Hurpore Chuhar*, the principal mouzah, deposed that for thirty-four or thirty-five years before the trial 34 bighas in *Dahia* had been in the possession of the factory under indigo cultivation; and the witness *Nund Lal Roy*, aged sixty years, a shareholder in *Dahia*, deposed that indigo was planted by the factory in thirty-four bighas which now "lie in the putti (or share) of the Plaintiffs," that at the time of the ijmali (the joint ownership) they were in the putti of the other two-third sharers, that the thirty-four bighas were granted to the saheb—meaning the factory—thirty-four or thirty-five years before the trial, and since that time the factory had been in possession of the thirty-four bighas cultivating indigo. Other witnesses deposed to the same effect.

By a pottah bearing a native date corresponding with the 29th of May, 1856, *Bahal Roy* and *Dukha Ray*, described therein as shareholding proprietors of mouzah *Harpore Jower* and two dependent mouzahs, leased about one-ninth share held and owned by them to Mr. *A. B. Lowe*, mokhtar on behalf of Mr. *Kitt Macleod*, proprietor of the *Bhugwanpore* and *Surajpore* factories. The lease stated that the lessee had been in possession and occupation of the leased property, and was to cultivate indigo or other crops and get cultivation made.

In April in the following year one *Posan Ray* presented a petition to the magistrate under Act IV. of 1840, regarding the possession of 29 bighas 11 cottahs 6 dhoors of khodkasht land in mouzah *Dahia*, the dakhili of mouzah *Hurpore Chuhar*. The petition stated that certain persons whose names are given, proprietors of a portion of mouzah *Hurpore Chuhar* and *Hurpore Berhal*, granted a ticca pottah (in respect of usli and dakhili) in favour of Mr. *Macdonald*, the proprietor of the *Bhugwanpore*

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factory, and that the servants of the factory had ploughed up the crops sown by the petitioner and had dispossessed him, and prayed that possession might be awarded to him.

The record of the magistrate's judgment is dated the 21st of April, 1857, and the Defendant is stated to be Mr. *E. T. Poe*, proprietor of the *Bhugwanpore* indigo factory. The case was dismissed on the ground that the Plaintiff had failed to prove any one of three points: 1. That the land was in the Plaintiff's possession as a shareholder in *Dahia*. 2. That the land was in *Dahia*. 3. That the parties who granted a lease of their share to Mr. *Poe* had no share in *Dahia*. It is immaterial whether the former proprietor of the factory was called *McLeod* or *Macdonald*. Mr. *Poe* appears to be, then, the proprietor; and in a receipt for rent in 1859, which will be hereafter noticed, he is called proprietor by purchase of 16 annas (the whole) of the factories of *Bhugwanpore*, &c. The Subordinate Judge takes a very erroneous view of this judgment, when he says of it in his judgment, "It is conclusive proof, shewing that the ryoti holding now set up did not then exist." It was not proof as to any holding. It proved only that a charge of dispossession was made against Mr. *Poe*, and was dismissed. As it does not appear that the Plaintiffs, or any persons through whom they claim, were parties to the proceeding, the statements in the petition are not evidence either for or against the Plaintiffs.

There are in the evidence six receipts for money received "from the general agent of Mr. *E. T. Poe*" for rent of land in indigo and jai (oat) cultivation. They are dated as follows: 30th of September, 1859 (two); 23rd of July, 1860; 5th of July, 1862; 3rd of February, 1864; and 14th of March, 1868. There is also in the record a kabuliyat executed by Mr. *L. G. Crowdy*, described as mokhtar of the *Bhugwanpore*, *Surajpore*, and other concerns, pergunnah *Naipore*, which states that he had leased a third out of the whole of mouzah *Dahia* at an annual rental of Rs.525 from the beginning of 1275 to 1283 F. (September, 1867, to September, 1876), being a period of nine years, and on receipt of a pottah from *Mussummat Chundrabati Koeri*, daughter of *Janki Roy*, deceased, and mother and guardian of *Goman Singh*, minor, had entered into possession of the estate leased. Then

follow these words: "For this reason, I do hereby declare that I, the declarant, shall by good treatment keep the resident and non-resident tenants satisfied and contented, and shall to the best of my ability cultivate or get others to cultivate the aforesaid village with indigo or with other crops." The pottah is not in the record. In 1874 the owners of *Dahia* took proceedings to obtain a partition of it; and on the 15th of June, 1874, Mr. *William S. Crowdy*, described as the manager and general agent of the indigo factory of *Bhugwanpore*, presented a petition complaining that the butwara (partition) amin had omitted to record in his measurement of the lands of the mehal *Hurpore Chuhar* the indigo cultivations made by the *Bhugwanpore* factory in about eighty-five bighas of land of the mehal, which it was his duty to do. The Deputy Collector dismissed this petition on an explanation made by the amin that he had recorded the name of the malik—the owner. On an appeal to the Collector he allowed the appeal, and by an order dated the 6th of August, 1874, he directed the amin "to mention the plots under indigo, together with the names of the planter and the concern." This was done, and there is in the Record an extract from the khusra (rough paper) of measurement of the lands of mehal *Dahia* prepared by the partition amins. In this 36 bighas 18 cottahs 6 dhoors of land are stated to be "in the zerat cultivation of indigo of the *Bhugwanpore* factory."

Of the documents in evidence, the next in date are a lease and kabuliyat thereon dated the 3rd of July, 1877, the lease being, with other lands of other owners, of the third share of *Dahia*, which had been awarded to *Chundrabati Koeri* in the partition. It is the lease referred to in the plaint as the foundation of the suit. In it and in the kabuliyat there is a provision that the lessee is to cultivate and get others to cultivate indigo, oats, or any other grain or crop.

Both the First Court and the High Court have found what, in their Lordships' opinion, is proved by the evidence, that the Defendant had possession of the land in the Plaintiffs' putti, which he now states to be 34 bighas 3 cottahs 8¾ dhoors, from 1856. But the First Court held that the "possession was all along under one or another mostajiri lease, and that therefore he

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did not acquire any right of occupancy." The High Court held that there was a right of occupancy; but the grounds of their opinion do not appear to their Lordships to be clearly stated. It appears to their Lordships that the leases were for the purpose of cultivating the land as a raiyat, and were not ijaras; and that the decision of the full Bench in *Sheo Prokash Misser* v. *Ram Sahoy Singh* (1) is applicable to this case. There it was held under *Bengal* Act VIII. of 1869, the law in force during part of the occupation in that case, and under Act X. of 1859 previously in force, that a raiyat who has held or cultivated a piece of land continuously for more than twelve years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land. Therefore, in the opinion of their Lordships, there is a good defence to the suit so far as regards the 34 bighas 3 cottahs 8¾ dhoors.

The plaint stated that the quantity of cultivated land in *Dahia*, except 3 bighas 14 cottahs, which were excluded from the pottah and kabuliyat, was 89 bighas 7 cottahs 7 dhoors 15 dhoorkis. The Defendant in his written statement said this was not true, that, "according to the measurement which took place in 1880, only 63 bighas 9 cottahs 13 dhoors 15 dhoorkis of land was found to comprise the entire putti of the Plaintiffs which was held by the Defendant." As the suit was dismissed by the High Court this question of the quantity of land included in the lease has not been determined by that Court in this suit. In a suit for rent which by consent of the parties was tried together with this suit, the first Court decided this question against the Defendant, and there does not appear to have been any appeal upon it.

As to the second question—possession by the Defendant of the remaining land—the First Court thought there was reliable evidence that the Defendant was in possession, referring to three of the Plaintiffs' witnesses as proving it. The Defendant appears to have mainly relied upon a lease to one *Mannu Chowdhry*, made by *Muna Koeri*, the mother-in-law of *Chundrabati*, dated the 25th of November, 1884. This lease alone, if

(1) 8 Beng. L. R. 135.

really made, would not be evidence of possession by *Mannu Chowdhry*, and only one witness, *Dukha Mahton*, a holder of two bighas, deposed to payment of rent to him. Neither *Mannu Chowdhry* nor Mr. *Crowdy*, the manager of the factory, who must have known about the possession, was called as a witness, nor any proof given that either of them could not be called. The High Court found that the Defendant was not in possession of the land, that it was in possession of the "Plaintiff's mother-in-law as owner." They rest this finding mainly upon the report of a police officer, made in consequence of a petition of *Muni Sing*, the husband of *Chundrabati*, after the suit was instituted, that the Defendant had sided with his old co-sharers in the village, and had given orders that whenever he should go to collect the rents a criminal case was to be brought against him. The High Court say, "In that (the report) the police officer intimates that, in his opinion, the case was untrue; that the mother-in-law, *Mussummat Muna Koeri*, had only one daughter, who married *Muni Singh*, and on that occasion she had made a gift of the property to her daughter and her son; that *Muni Singh*, on coming into possession, appropriated all the money and left the mother-in-law in a state of starvation; that she in retaliation took possession of the property from the saheb (the factory), and leased it out on receipt of Rs.600." This report is not in the Record. Their Lordships are unable to understand upon what ground the High Court considered that the opinion of the police officer was evidence of *Muna Koeri* being in possession. A police officer has not authority to make a judicial inquiry about possession, and his opinion most probably was founded entirely upon hearsay. Seeing that Mr. *Crowdy* was not a witness, it appears to be possible that the allegation in the petition of *Muni Singh* of collusion was true, and that the lease was made to be used as a defence to the suit. The finding of the First Court on this question of possession was in accordance with the evidence, and should not have been reversed by the High Court.

Their Lordships' attention has been called to the inquiry which took place for the purpose of ascertaining the lands in which the Defendant claimed his right of occupancy. On the

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hearing of the appeal, the High Court rightly held that the *onus* lay on the Defendant to point out these lands, and they referred it to the District Judge to depute an amin to find out the "lands covered by the khusra of the bŭtwara." That appears to be right in principle. The Defendant was bound to identify the 34 bighas 3 cottahs 8¾ dhoors which he claims, and to shew that they are in the khusra and in the putti of the Plaintiffs, as he alleges in his written statement. But the finding of the amin does not specify any such quantity of land. He finds that the lands now identified as the Defendant's jote are 76 bighas and a fraction by one measure and 36 bighas and a fraction by another, and that the indigo plantation land in the khusra is 49 bighas and a fraction. In dismissing the suit the High Court say, "We accept the report of the amin, and we find that the District Judge has substantially carried out the remand order." Perhaps, for the purpose of dismissing the suit, the amin's findings were sufficient. But for the purpose of ascertaining the precise land claimed by the Defendant the findings are abortive and useless. And as their Lordships hold that the suit should not be dismissed, and that it is necessary to ascertain the lands claimed, there must be a fresh inquiry.

The result is that the Plaintiffs are entitled to a decree for possession of the land included in the lease of 1877, except the 34 bighas 3 cottahs 8¾ dhoors, in which the Defendant should be declared to have a right of occupancy, and the decrees and order of the Courts below ought to be reversed and the suit remanded to the High Court to have an inquiry made as to the situation and boundaries of these last-mentioned lands, and also of the remaining lands included in the said lease, and thereupon to make a decree for possession to the Plaintiffs of the remaining lands and mesne profits thereof, with costs to the parties in the Courts below in proportion to the result. Their Lordships will humbly advise Her Majesty accordingly.

In the special circumstances of this case their Lordships are of opinion that the Appellants should have the costs of this appeal.

Solicitors for Appellants: *T. L. Wilson & Co.*

Solicitors for Respondent: *Sanderson, Holland, & Adkin.*

TANJORE RAMACHENDRA ROW AND OTHERS . . . . . } PLAINTIFFS;

AND

VELLAYANADAN PONNUSAMI AND OTHERS . . . . . } DEFENDANTS.

J. C.* 1891 Jan. 31.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Acknowledgment of Debt—Construction.

Where in order to elide the *Limitation Act* the Defendant gave a written acknowledgment of an existing debt, and engaged to settle accounts and pay within a specified time the amount which might be due, *held*, that this did not operate a complete novation of the debt giving to the creditor a right *ex lege* (in the absence of special stipulation to the contrary) to interest from the due date at a rate greater than that which the debt had previously borne.

APPEAL from a decree of the High Court (Feb. 12, 1885), modifying in favour of the Respondents a decree of *Turner*, C.J. (Jan. 25, 1884).

The facts are stated in the judgment of their Lordships.

One of the questions in the appeal related to the rate of interest which the Plaintiffs were entitled to recover in respect of Government promissory notes for Rs.55,000 which the Plaintiffs made over to the first Defendant on or about the 23rd of April, 1877. The Plaintiffs claimed in respect of those notes interest at the rate of 12 per cent. per annum, while the Defendants contended that they were liable only for interest at the rate of 4½ per cent., which was the rate payable by the Government to the holder of the note. The Government notes were transferred by the fourth Plaintiff to the first Defendant on the above date, and a promissory note was given by the first Defendant to the fourth Plaintiff in return for them. On the 19th April, 1880, the said Plaintiff wrote to the first Defendant, and, in effect, requested him, if he had "no mind to renew the note," to write a letter in the form inclosed, promising, so as to prevent the bar of

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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limitation, to pay in two months "the whole of the amount of the aforesaid note, viz., Rs.62,425," being principal, and Rs.7425 interest at 4½ per cent. The next day the first Defendant wrote, with some modification, the promise requested. The Plaintiff's explanation was, that though 4½ per cent. was "out of confidence" stated in the promissory note, yet 12 per cent. was in reality intended to be paid. The Defendant explained that he took the Government notes at the request of the Plaintiff, who desired to get them out of his hands for his own purposes, and that nothing more than 4½ per cent. was payable. The First Court held that 4½ per cent. was payable up to the 22nd of April, 1880, and 12 per cent. thereafter, being "in the nature of damages for the failure to fulfil the promise"; that rate of interest being in the absence of special arrangement payable according to the practice of the parties. The High Court held that the Plaintiffs' rights were limited to the principal sum of Rs.55,000, with interest thereon until paid at the rate of 4½ per cent. per annum, and interest on such interest at the rate of 12 per cent.

Mayne, and *Branson*, for the Appellants.

Graham, Q.C., and *Doyne*, for the Respondents.

The judgment of their Lordships was delivered by

LORD WATSON:—

This is a suit between two undivided Hindu families, who may be conveniently described as the "Plaintiffs" and the "Defendants," because, whilst some of the transactions to which it relates are denied, it is not disputed that the individual members who are alleged to have entered into those transactions had authority which would have enabled them to bind their respective families. As originally framed, the plaint concluded for repayment of specific advances with interest; but, before the adjustment of issues, it was amended so as to cover a claim for a partnership accounting in regard to all abkary contracts taken up by them and the Defendants during the period of three years commencing from the 9th of March, 1878.

The Plaintiffs, who are the present Appellants, complain of a

judgment of the High Court of *Madras*, reversing an order passed by Sir *Charles Turner*, C.J., in the exercise of the original civil jurisdiction of the Court, in so far only as the reversal concerns (1.) the rate of interest payable by the Defendants upon an admitted loan of Rs.55,000; (2.) the right of the Plaintiffs to participate in certain abkary contracts effected in their own name by the Defendants; and (3.) the validity and effect of a writing bearing date the 16th September, 1880, signed by the managing member of the Plaintiffs' family. The argument at the Bar has been confined to these points, which will be noticed in the order in which they have been stated.

On the 23rd of April, 1877, the Plaintiffs advanced in loan to the Defendants the sum of Rs.55,000, in Government bonds bearing 4½ per cent. interest, and received from them, of same date, a promissory note for the amount, payable on demand, with interest at 4½ per cent. per annum. The loan was not called up: and on the 19th of April, 1880, the triennial period of limitation being about to expire, the Plaintiffs wrote to the first Defendant suggesting that, if they had no mind to renew the note, they should send a letter undertaking to pay the principal and interest within two months. The Defendant replied by a letter dated the 20th of April, 1880, admitting their liability under the promissory note, stating that the interest due upon the unpaid principal of Rs.55,000 until the 22nd of the month was Rs.7425, and containing these obligatory words: "With regard to these Rs.62,425, I will settle the accounts and pay the amount which may be due within two months, though the note might be barred by the *Statute of Limitations*." After the receipt of that letter, no demand for payment appears to have been made by the Plaintiffs until the present suit was brought in March, 1881, when they claimed interest at the rate of 12 per cent. per annum.

The Plaintiffs now maintain that the undertaking given by the Defendants operated a complete novation of the debt—that it transmuted the loan of Rs.55,000 bearing 4½ per cent. interest into a legal claim for the principal sum of Rs.62,425, upon which, in the absence of any stipulated rate, interest became

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due *ex lege* from the time of payment. That construction of the letter of the 20th of April appears to their Lordships to ignore the express obligation which it imposes upon the Defendants to "settle accounts," and to pay the amount "which may be due" within the two months allowed for payment. These expressions plainly import that the sum specified in the letter merely represented the amount of their liability calculated to the 22nd of April, and did not represent the sum payable by them at the date of actual settlement, which was to be ascertained by taking accounts, or, in other words, by making a new calculation so as to include interest accruing up to that date. The letter was applied for, and was given solely with the view of eliding the *Statute of Limitations*; and, in the opinion of their Lordships, it had as little effect in altering the quality of the debt constituted by the promissory note as would have been produced by a notice of the same date from the Plaintiffs requiring payment within two months.

The next point taken by the Plaintiffs raises a question of fact. They allege that, on the 9th of March, 1878, one of their number entered into a verbal contract with a representative of the Defendant family, to the effect that all abkary contracts made by the Plaintiffs or Defendants within three years from that time, whether with or without previous consultation and arrangement, should be shared by both families, in the proportions of one quarter to the Plaintiffs and three quarters to the Defendants. The Defendants do not dispute that certain abkary contracts, taken by the Plaintiffs in their own name during the period in question, were shared by the two families in these proportions; but they deny the existence of the antecedent general agreement alleged by the Plaintiffs, and maintain that the subsequent participation of the two families in these contracts was due to special arrangements made at the time with reference to each contract. It is matter of admission that, during the same period, the Defendants took up in their own name several abkary contracts which it is unnecessary to enumerate; and the Plaintiffs consider themselves aggrieved by the finding of the High Court that they are not entitled to claim a share of these contracts or of the profits arising from

them. They have neither alleged nor attempted to prove that a special agreement was made in relation to each of these contracts, so that they cannot successfully impeach the decision of the Court below, unless they establish the general agreement of the 9th of March, 1878.

The direct evidence bearing upon that agreement, which is of the most meagre description, is to be found in the oral testimony on the one side of the first Defendant, *Thavasimuttoo Nadan*, and on the other of *Tooljaram Row*, the fourth Plaintiff, and of three other witnesses who, according to his evidence, were present at the time when it was concluded.

The evidence of the fourth Plaintiff is contained in these words: "In 1878 a verbal agreement was made that, in all abkary contracts taken between March, 1878, and 30th of June, 1881, by me or by first or second Defendants, I should have a quarter share." That is contradicted by the first Defendant, who admits that "there may have been conversation" about sharing contracts taken during that period, but denies that any general agreement was made with respect to such contracts at any time, and states that all agreements to share were specially made at the dates when the contract was taken, and also that when made they were reduced to writing. The three witnesses, who are said to have been present when a general agreement was concluded, are intimately connected with the Plaintiffs. *Viramuttu Mudaly*, their partner in a printing firm, says: "I was present when first Defendant agreed with Plaintiffs that contracts should be taken in the names of fourth Plaintiff and Defendants one and two, and that fourth Plaintiff should be interested to the extent of one-fourth." *Lazarus Cashart*, a clerk in the employment of the same firm, says: "I was present when the first Defendant agreed with fourth Plaintiff that he should obtain a quarter share in the profits of any contract taken in the name of the first Defendant, or second Defendant, or fourth Plaintiff, in any taluk." The third of these witnesses, *Venkatasamy Iyer*, who is a gomashta in the employment of the Plaintiffs, and had, according to the fourth Plaintiff, the same opportunity of hearing what passed, does not corroborate the Plaintiffs' case. He does not state, and was not invited by them

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to state, what passed on the occasion of the alleged agreement; but he was examined as to communications which took place between the parties in relation to abkary contracts for which the Defendants had tendered in the beginning of April, 1878. If the case made by the Plaintiffs is true, they were bound to share as partners in these contracts; but according to this witness they declined to aid in making the deposit necessary in order to obtain them. He says, "there had been a proposal to give Plaintiff a fourth share;" and he adds—"at that time no complete agreement was made that Plaintiffs should have a share."

It appears to their Lordships as the result of that evidence to be highly probable, if not certain, that in or about the month of March, 1878, a conversation or conversations took place between the fourth Plaintiff and first Defendant with regard to their families becoming jointly interested in future contracts. Whether these communings were in such terms as to constitute a binding engagement to share in all contracts which either of them might choose to enter into, or merely amounted to a provisional arrangement that they would divide in the proportion of one-quarter and three-quarters such contracts taken by one or other of them as they might mutually approve of and agree to hold as partners, appears to be the real controversy which their Lordships have to determine. In that view, the evidence adduced by the Plaintiffs is vague and unsatisfactory. It is the plain duty of every litigant who endeavours to set up a verbal contract to lay before the Court, not the mere impressions of the witnesses who heard the communings, but in so far as possible the particulars of what was said or done, so as to enable the Court to form its own conclusions upon the question whether these did or did not import a binding agreement in the terms alleged. The Plaintiffs have carefully abstained from making any attempt to fulfil that duty, and have contented themselves with eliciting the conclusions derived by the witnesses from what they heard or supposed that they heard. It is not even clear that the witnesses are speaking of the same occasion, because the fourth Plaintiff fixes it on the 9th of March, whereas his partner *Viramuttu* says it was

some time in the month of April, 1878. Besides, the evidence of *Viramuttu* does not fully bear out that of the fourth Plaintiff; it only implies that some contracts were to be taken in which the parties were to share, and tends rather to support than to exclude the inference that the selection of the particular contracts which were to come within the arrangement then made was to be matter of future agreement. The Plaintiffs' oral evidence, standing by itself, would form a very shadowy foundation for a contract; but it is directly contradicted by the first Defendant, and it is quite inconsistent with the testimony given by their own servant and witness, *Venkatasamy Iyer*, whose veracity they did not attempt to impugn.

Their Lordships have had no difficulty in coming to the conclusion that the parole proof which they have adduced fails to establish the partnership agreement which the Plaintiffs allege. There are in evidence written and also verbal communications between the parties with respect to abkary contracts, taken by the Plaintiffs during the currency of the alleged agreement, in which the Defendants had admittedly a quarter share. But none of these communications countenance the suggestion that the Defendants took their shares by virtue of an antecedent general agreement, or otherwise than by a specific agreement made with reference to each contract at the time when it was taken up by the Plaintiffs; and save in one instance (to be noticed presently), no allusion is made in them to abkary contracts taken up by the Defendants. It is, in their Lordships' opinion, unnecessary to consider the arguments addressed to them for the Plaintiffs with regard to the probabilities of the Defendants having entered into the agreement of the 9th of March, 1878, which were nothing more than a series of speculations having no foundation in the evidence.

In their argument upon this appeal, the Plaintiffs for the first time maintained that, irrespective of the general agreement, there is evidence to shew that they acquired right as partners to three-quarters of an abkary contract for *Salem* taluk, which was obtained by the Defendants in June, 1878, and that they ought accordingly to have an accounting for their share of profits. No such claim is made in their plaint; and it appears from a passage

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in the judgment of the High Court that it was repudiated by them, and that they only sought to use the evidence upon which it was preferred here as proof in aid of the existence of a general agreement of partnership. These facts would afford sufficient reason for refusing to entertain the claim now. But their Lordships think it right to observe that the fourth Plaintiff's letter of the 25th of August, 1878, and the second Defendant's reply, dated the 27th of August, when read together, do not necessarily imply that the Plaintiffs were partners in the *Salem* contract. That part of the correspondence in which mention is made of *Salem* has exclusive reference to management; it does shew that the parties were arranging that a certain individual should reside in *Salem* and superintend several abkary contracts, but it does not *per se* shew that these contracts were all joint. The letters contain a distinct acknowledgment by both parties of their partnership in contracts other than *Salem*, and that in terms which seem to negative the existence of any general agreement.

The last point submitted to us had reference to the validity, and also (assuming it to be valid) to the effect of a writing dated the 16th of September, 1880, signed by the fourth Plaintiff, which bears, *inter alia*, that he agreed, upon the conditions therein stated, to surrender the whole interest of the Plaintiffs in the joint abkary contracts standing in their name to the Defendants, who were to take over all profits and losses. The Plaintiffs pleaded that the document was not a completed contract, and was never acted upon. A complete answer to the first part of the plea is to be found in the evidence of the fourth Plaintiff, who states that it was written in his presence to the dictation of the Defendants, and was then signed by him and delivered to the Defendants; whilst the allegation that the writing was never acted upon is explained by the fact that the Plaintiffs subsequently refused to settle accounts in accordance with its provisions. The question raised as to the legal effect of the document has ceased to be of practical importance, in consequence of the failure of the Plaintiffs to prove any joint abkary contracts other than those standing in their own name. Their Lordships are of opinion that the Plaintiffs were right in main-

taining that the document contains no stipulation referring to abkary contracts standing in the name of the Defendants; but that circumstance, coupled with the statement in the fourth Plaintiff's evidence, to the effect that he signed it because he was "anxious to get rid of the matter anyhow," appears to them to confirm their conclusion that there never was any general agreement binding the Defendants to give the Plaintiffs an interest in their contracts.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The Appellants must pay to the Respondents their costs of this appeal.

Solicitors for Appellants: *Keen, Rogers & Co.*

Solicitors for Respondents: *Lawford, Waterhouse, & Lawford.*

ZEMINDAR OF MERANGI . . . . . DEFENDANT;

AND

SRI RAJAH SATRUCHARLA RAMABHADRA RAZU AND OTHERS . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Law—Rule of Partibility—Onus Probandi—Impartibility not proved.

Held, with regard to a zemindari granted in 1803, that the *onus* was on the zemindar to prove that his zemindari was impartible.

Where the evidence failed to show that the nature and terms of the grants by the Government under which the zemindari had been held during the present century contemplated impartibility, or that there had been any usage to that effect in the succession to the estate or its enjoyment:—

Held, that whether or not impartibility had been the ancient rule applicable to the estate, it could not now be exempted from the ordinary rule of Hindu law which rendered such property partible.

APPEAL from a decree of the High Court (March 13, 1888) affirming a decree of the District Court of *Ganjam* (Dec. 14, 1885).

The suit was brought by the uncles of the Appellant to obtain

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR BARNES PEACOCK, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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partition of the zemindary of *Merangi*, of which he was the registered proprietor. Both Courts held that the zemindary was partible. There were no facts in dispute, and the whole matter at issue was whether upon the admitted facts the legal inference was that the estate was of an impartible or partible character.

The known facts as to the history of this zemindary are imperfect and obscure. Both parties agreed to accept the following passage from the *Vizagapatam* Manual as summarising all the available information on the subject:—

"Ancient Zemindari Families and Estates.

* * * *

"XIII. The *Merangi* Family and Estate.

"1. This hunda came into the possession of the present family in the time of *Visvambhara Deo* of *Jeypore*. In his reign *Dharma Raz Dora*, zemindar of *Merangi*, endeavoured to make himself independent, but *Jeypore* advancing against him with a large force, he fled to *Parla Kimedy*, whence he was given up by the rajah of that country on *Jeypore* agreeing to cede the "*Buttelly*" taluk to *Kimedy*. He was then put to death, his estate being made over to one '*Jagannath Raz*,' a principal Jeyporean, who was at the same time required to marry his predecessor's widow. Upon the occasion of his installation as zemindar *Jagannath Raz* was honoured with the title of *Satrucharla* (destroyer of the enemy), which is still borne by his successors.

"2. About the time the French were expelled, *Merangi* was incorporated with the neighbouring zemindari of *Karupam* by the prowess of *Kurupam Sivaram Raz*. This chieftain, in his turn, was overthrown and imprisoned by *Pusapati Sitaram Raz*, and both estates continued under *Vizianagaram* till its dismemberment in 1795, when they were restored to the old families, *Satrucharla Ganga Raz* getting *Merangi*."

It was stated in the judgment of the original Court that the incorporation of *Merangi* with *Kurupam* took place in 1759.

It was admitted that *Satrucharla Ganga Raz*, the common ancestor of Plaintiffs and Defendant, was a descendant of the *Jagannath Raz* upon whom this title was first bestowed.

The circumstances under which the zemindary was restored to the *Satrucharla* family are detailed as follows by the commis-

sioners appointed to carry out the permanent settlement in their report to Government, dated the 22nd of September, 1803:—

"On Mr. *Webb's* taking charge of the district in 1795, *Venkata Raz*, the representative of the younger branch of the family formerly in possession of the *Merangi* zemindari, was in arms against the Company, and his defection induced the collector to recommend *Ganga Raz* being appointed zemindar as well on account of his better pretensions than those of *Venkata Raz*, as that he was descended from the elder branch of the family.

"19. This preference, it would appear, confirmed *Venkata Raz* in his opposition to the Company's government, and on the breaking out of the disturbances in *Kemidy*, he joined the party of *Jaggernath Deo*. To detach him from this rebel, Mr. *Webb* considered it expedient to promote a settlement for his son *Jagannath Raz* in the *Merangi* zemindari, by granting him a portion of the country. In this he has so firmly established himself that it is known by the name of *China Merangi*, and as he makes all his payments directly to the treasury of the Collector, he appears to consider himself as joint zemindar with his relation *Ganga Raz*, holding immediately from the Company, though on being required to set forth his pretensions he did not attempt to prove more than his being a son of the younger brother of *Ganga Raz's* father, which of course established no right of participation; he must, therefore, be considered as holding the share he now possesses through the favour of his cousin, *Ganga Raz;* consequently, he cannot advance a claim to partake of any addition that may be made to the zemindari either by the resumption of alienations or otherwise.

"20. If the tenure of *Jagannath Raz* be viewed in this light, Mr. *Alexander* conceives that the permanent settlement need not be retarded, but that on its taking place an engagement may be entered into by *Ganga Raz* with his relation for the temporary or permanent lease of the country at present held by him adverting to the amount of the total jumma fixed on the whole zemindari.

"21. We concur in opinion with Mr. *Alexander* that an arrangement of this nature was desirable as tending to preserve the peace of the country which might otherwise be disturbed by *Jagannath*

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Raz; yet as his claim originated only in the concession of the late collector, Mr. *Webb*, yielding to the pressure of temporary circumstances, without the authority or even knowledge of Government, we do not think that any reference should be had to him in forming the permanent settlement, which we would recommend to be made exclusively with the acknowledged zemindar, *Ganga Raz*, who will be at liberty to make what arrangement he pleases with *Jagannath Raz*."

The Government concurred with the commissioners in their "opinion that the permanent settlement of this zemindary should be concluded with the rightful proprietor, *Ganga Raz*." He however died before the sannad-i-milkeat istimirar was delivered to him, and the actual settlement was made with his son *Chandrasekhara*, on the 25th of April, 1804.

In 1805, *Vizabadra*, second son of *Venkatapathi*, whose elder brother *Jagannadha* was then dead, sued *Chandrasekhara* to recover the zemindary. He based his claim on an alleged bequest by *Ganga Raz*, and upon the asserted illegitimacy of *Chandrasekhara*. The suit was dismissed, both in the original Court and on appeal.

Chandrasekhara, who appears to have been imbecile, fell into pecuniary difficulties, and his estate was sold under decree of the Civil Court to pay his debtors. It was purchased by the *East India Company* for Rs.500 on the 20th of June, 1833. At this time a rebellion was going on in the *Palcondah* region. The dewan of the late zemindar, and some of his retainers, sided with Government, and killed the leaders of the rebellion. They were offered a reward, but entreated that instead of granting it to them, "the Government would be pleased to restore the zemindari of *Merangi* to the Ancient Family." This request was warmly supported by the special commissioner, Mr. *Russell*, and agreed to by the Government, and accordingly a new sannad was granted on the 22nd of September, 1835, to the minor son of the late zemindar *Jagannadha*. This sannad was in the usual form of such documents, except that it contained a special recital, stating the circumstances under which the estate had been lost to *Chandrasekhara* and restored to *Jagannadha*. The first clause of the sannad, provided that "the zemindari shall not be liable for

any debt contracted prior to the date of this sannad, but for the balance actually due to Government."

In 1859, one *Somaraz*, who alleged himself to be the cousin of the zemindar, applied to the collector for a partition of the zemindary as being undivided family property. He was referred to a suit, and no more was heard of his claim.

Jagannadha was succeeded in 1864 by his son *Chandrasekhara*, during whose life no attempt at a partition was made by his brothers the present Plaintiffs. *Chandrasekhara* was again succeeded by his son the present Defendant in 1869. No attempt was made to oppose his registration as sole zemindar. In 1872, however, a claim was made by the present Plaintiffs to have a general partition of all the property including the zemindary. This claim was conceded as regards the personal property, and the matter was referred to a panchayat, which made its final award on the 7th of October, 1874.

On the 1st of June, 1883, a formal notice demanding a partition of the zemindary was served upon the minor zemindar, then under the guardianship of the Court of Wards, and on the 20th of September, 1883, the Plaintiffs commenced the suit out of which this appeal arose. They alleged that at the time of the permanent settlement *Ganga Raz* and *Jagannadha* were enjoying the *Merangi* zemindary jointly, and that the sannad was issued to *Ganga Raz* as manager of the joint family. The cause of action was alleged to have accrued on the 13th of May, 1872, when the collector refused the Plaintiff's application for a partition.

The Defendant's written statement alleged that the zemindary was originally held by military tenure, and was in its nature impartible. It denied that *Jagannadha* and *Ganga Raz* had held jointly, or that *Ganga Raz* had been granted the sannad as manager of a joint family. It asserted that both before and after the first sannad the zemindary had been held as an impartible estate passing by lineal primogeniture; and that the second sannad, in 1835, created no new tenure, but restored the zemindary in the same character as had previously existed.

Various issues were settled, of which only two are material to this appeal:

"3. Whether the zemindari of *Merangi* is partible or not?

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"4. Whether the grant of 1835 was a new grant or a renewal of the old grant?"

The District Judge of *Ganjam* decreed in favour of the Plaintiffs for a partition of the zemindary with mesne profits for three years, but without costs.

In his judgment he stated that the *Merangi* estate was originally held on military service tenure from the Rajah of *Jeypore*. He then traced its history down to 1821, and after noticing the scantiness of evidence as to the devolution of the estate, and expressing his opinion that it could not be regarded as a principality or raj, he proceeded as follows:—

"As to immemorial family usage, it appears that the estate had never been divided prior to the English rule, and in ordinary cases where property descends to one member of a family, the presumption would be in favour of primogeniture, but any such presumption would be much weakened in the present case when we regard the military nature of the tenure and the unsettled character of the Government in the last century, and would be quite insufficient to establish a family custom which must be proved by clear and positive evidence.

"Further, even assuming that the family custom of primogeniture formerly governed the descent, there was a breach of continuity in the custom for nearly half a century, and the old custom would not attach to the estate restored under new conditions, unless the family subsequently shewed their intention to adopt it."

Finally, he stated that there was nothing at the time of the permanent settlement to indicate that the Government intended to create an impartible estate for the first time.

In this view of the case, he thought it unnecessary to consider the 4th issue. "If the estate be partible, notwithstanding the permanent settlement, there is nothing in the terms of the new sannad to constitute it impartible."

The High Court confirmed the decree of the lower Court except as to costs, and dismissed the appeal with costs, both in original and appellate Courts.

Mr. Justice *Kernan*, who delivered the judgment of the High Court, said:—

"The Appellant contends that the zemindari was held by military tenure. The Judge assumes this was so before *Jeypore* took possession from *Dharma Raz*, and afterwards when he gave the zemindary to *Ganga Raz*: probably it was so, though I do not see the evidence of it."

He then commented on the break in the possession of the family from 1760 up to 1795, and said that after 1795 the zemindary was certainly not held on military tenure. He considered that from 1795 *Ganga Raz* was merely in possession on sufferance for seven years, and that there was no reasonable ground for presuming that it was the intention of the Government to create an impartible zemindary. He thought that the terms of sect. 6 of the sannad, as to the right of transfer, were inconsistent with the idea that the zemindary was impartible, and was to remain so. As to the sannad of 1835, he considered that it only conferred on the grantee an estate in the zemindari of the like nature that his father held in it—that is, an ordinary zemindari subject to the ordinary incidents of Hindu law.

Mayne and *Michell*, for the Appellant, contended that the decree of the High Court should be reversed, and the suit of the Respondents dismissed with costs. On the evidence, the High Court ought to have held that the zemindari in question up to 1795 was impartible, as being a military tenure, and also by family custom. Further, the circumstances under which the zemindary was re-granted to *Ganga Raz*, and permanently settled with his son, shew that the intention of the Government was not to create a new zemindari, but to restore an ancient one. Some of those circumstances were connected with the disturbed state of the district at that time, which required that power should be concentrated in one large holder rather than distributed amongst several smaller ones. The restoration of the old title carried with it all those incidents of impartibility and primogeniture which were then supposed universally to attach to such zemindaries. The terms of sect. 6 of the sannad, giving a right to transfer, did not conflict with such intention. And the subsequent conduct of the junior members of the family is evidence of a belief in the family that a custom of impartibility

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existed and was binding upon them. In the suit in 1805, of *Vizabadra* against *Chandrasekhara*, it did not seem to have occurred to anyone that partition was possible. In 1859, when *Somaraz* was referred to a suit for partition, he dropped his claim. The sannad, moreover, which was granted in 1835, did not grant a partible estate. It was intended thereby to restore the ancient zemindari of *Merangi*, not to create a new one. When Government makes a grant, the presumption is that the grantee should hold according to the law and custom of his race. Partibility attaches to the family, not to each beegah of the land. Reference was made to the *Nuzvid Case* (1); the *Hunsapore Case* (2); the *Shivagunga Case* (3); the *Devarakota Case* (4). In *Bengal* there is a regulation that all zemindaris should be partible: in *Madras* there is not.

The Respondents did not appear.

1891 Jan. 31.

The judgment of their Lordships was delivered by

MR. SHAND:—

The matter for determination in this case, which arises on a question of disputed succession between the parties, is whether the zemindari of *Merangi* is partible or impartible. The Appellant, the present registered zemindar of *Merangi*, maintains that the estate, which is described on the record as consisting of eighty-six villages with their hamlets, situated below the *Ghauts*, and adjoining the zemindari of *Jeypore*, is impartible; and he complains of the decisions of the District Court of *Ganjam*, and of the High Court at *Madras*, in both of which Courts the judgments have been to the effect that the zemindari is partible, and consequently divisible between him and the Respondents, for whom no appearance was made at the hearing of this appeal.

Their Lordships are of opinion that the judgments of the Courts of First and Second Instance are right. It is unnecessary to recapitulate the facts, which are fully stated in the judgments complained of. For the purpose of this decision it may be assumed, as it was by the Subordinate Judge—the High

(1) L. R. 7 Ind. Ap. 40.
(2) 12 Moore's Ind. Ap. 1.
(3) Ind. L. R. 3 Mad. 290.
(4) L. R. 17 Ind. Ap. 134.

Court say there is no evidence of it—that the zemindari was at one time held under military tenure from the Rajah of *Jeypore*, when it was granted to an ancestor of the present Appellant. It may further be assumed, though there is little if any evidence to warrant the assumption, that the tenure continued to be the same after the estate had been taken by force and incorporated in *Kurupam* zemindari, and subsequently when by conquest it again became part of the *Vizianagaram* zemindari which was dismembered in 1795. Taking it, in accordance with the argument of the Appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate, which is in no way distinguishable from an ordinary zemindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zemindari is now a partible estate in a question of succession.

The grant of 1803 by the Government does not appear amongst the documents on the record; but it is clear from the kabuliat that the sannad-i-milkeat istimirar was in the ordinary terms of such grants. There is nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zemindari, as an exception to the ordinary rule of succession of the Hindu law. The single circumstance that the property was given to a representative of an elder branch of the family formerly in possession, in preference to the representative of a younger branch who had been in arms against the Government, is of very little weight; and accordingly, even at this early date, in the beginning of the century, it appears to their Lordships that the zemindari of *Merangi*, if impartible before, became partible in a question of succession, as it became also subject to the disposition of the zemindar by deed of transfer on sale or gift of the whole or part of the property.

What occurred in 1835, however, makes the determination of

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the case perhaps even more clear. The estate had again come into the possession of the Government. It had been exposed to public sale for payment of debt due by the zemindar, and might have been bought by any third party as purchaser. The Government, however, bought it, and held it for some time. During this time the dewan of the former zemindar, and certain of the doratanams, performed an important service to the Government, who had offered a considerable pecuniary reward for the capture or putting down of certain rebels who had caused much disturbance in the district. They succeeded in putting down the rebellion. Instead of the pecuniary reward to which they became entitled, they begged that a new grant of the zemindari might be given to the son of the former zemindar (then still in life), who was a boy of only nine years of age, and the grant was accordingly made to this boy in the usual terms of a sannad-i-milkeat istimirar, and his heirs, with the ordinary power of sale or disposal of the property in whole or in part, and concluding with the words:—Art. 14. "Continuing to perform the above stipulations, and to perform the duties of obedience to the British Government, its laws and regulations, you are hereby authorized and empowered to hold in perpetuity to your heirs, successors, and assigns, at the permanent assessment herein named, the zemindari of *Merangi*." It appears to their Lordships that here again, for a second time, there was such a dealing with the estate, as in the circumstances, and having regard to the terms of the grant, clearly shews that there was no intention to create an impartible estate, assuming there was power to do so, or to restore an estate previously impartible. The circumstances were entirely different from those which occurred in the *Hunsapore Case* (1), where an estate, in itself an important raj or principality, was simply confiscated to the Government and again given out to the nearest heir of the next line. As was observed in the judgment, "the transaction was not so much the creation of a new tenure as the change of the tenant." In the present instance the grant followed on a purchase of the property by the Government; it was given, on the solicitation of persons who had a claim against the Government, to one who, though no

(1) 12 Moore's Ind. Ap. 1.

doubt the son of the former zemindar, might have had no such grant but for the intervention of those persons who were attached to him; and there is nothing in the terms of the grant to support the contention of the Appellant,—on whom the *onus* lies of proving that this is the exceptional case of a zemindari impartible in its nature,—and nothing to prove a usage or custom of succession, throughout the operation of the grants of 1803 or 1835, contrary to the ordinary rule of the Hindu law.

Their Lordships therefore will humbly advise Her Majesty that the decree of the High Court ought to be affirmed, and the appeal dismissed. The appeal having been heard *ex parte* their Lordships make no order as to the costs of it.

The costs of an application for leave to be heard, which was made, after the conclusion of the hearing of the appeal, by certain of the Respondents, and which was opposed by the Appellant, must be paid by those Respondents.

Solicitors for the Appellant: *Burton, Yeates, Hart, & Burton.*

RAJA HAR NARAIN SINGH . . . . DEFENDANT;

AND

CHAUDHRAIN BHAGWANT KUAR AND ANOTHER . . . . . } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Civil Procedure Code, ss. 508, 514, 521—Invalidity of Award—Delivery of Award after due Date.

An order referring a suit was made by the Civil Court under sect. 508, Civil Procedure Code, without fixing a time within which the award should be made; subsequent orders, under sect. 514, corrected this mistake, the last of them extending the time to the 20th of March, 1885. The award was delivered on the 24th of March, 1885; a decree was made upon it which was affirmed by the High Court:—

Held, that, under sect. 521, the award was invalid, and that the suit referred must be proceeded with. No costs were given to the Appellant

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* *Present*:—LORD WATSON, LORD MORRIS, and SIR RICHARD COUCH.

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in the Courts below, inasmuch as the objection to the validity of the award had not been taken therein.

Chuha Mal v. *Hari Ram* (Ind. L. R. 8 Allah. 548) approved.

APPEAL from a decree of the High Court (Dec. 16, 1887), affirming a decree of the Subordinate Judge of *Agra* (April 6, 1886), whereby it was ordered that the Appellant should pay to the Respondents the sum of Rs.29,431, with costs.

The decree was based on an arbitration award, and the question decided in the appeal was whether, under the circumstances stated in the judgment of their Lordships, the award was valid.

Branson, for the Appellant, contended that the award was invalid, not having been made within the time allowed by the Court. On three occasions—the 30th of November, 1884, the 31st of January, 1885, and the 20th of March, 1885, the time limited for making the award expired, without any award having been made, or any extension of time having been granted. No date was fixed in the first instance, and on the last occasion when an extension of time was granted, it had expired. The award was not delivered till the last date, however irregularly fixed, was passed. Reference was made to Civil Procedure Code, sects. 508, 514, 521; *Nusserwanjee Pestonjee* v. *Meer Mynooddeen Khan* (1). Reference was also made to the English *Arbitration Act* of 1889; *Gunga Gobind Naek* v. *Kalee Prosonno Naek* (2); *Simson* v. *Vengatagopalam* (3); *Behari Das* v. *Kalian Das* (4); *Chuha Mal* v. *Hari Ram* (5).

Lumley Smith, Q.C., and *R. Brown*, for the Respondents, contended that the Court could at any time enlarge, and did in fact sufficiently enlarge, the time for making the award. Any right to object to the extensions made has been waived. With regard to sects. 508, 514, and 521 of the Civil Code Procedure, it was urged that they were directory only, and not mandatory. [Reference was made to *Lord* v. *Lee* (6); *May* v. *Harcourt* (7), which were decided under the *Common Law Procedure Act*, 1854, s. 15.]

Branson replied, referring to *Mason* v. *Wallis* (8).

(1) 6 Moore's Ind. Ap. 134.
(2) 10 Suth. W. R. 206.
(3) Ind. L. R. 9 Mad. 475.
(4) Ibid. 8 Allah. 543.
(5) Ind. L. R. 8 Allah. 548.
(6) Law Rep. 3 Q. B. 404.
(7) 13 Q. B. D. 688.
(8) 10 B. & C. 107.

The judgment of their Lordships was delivered by

LORD MORRIS :—

This case must, in their Lordships' opinion, be decided entirely upon the construction of the Civil Procedure Code, sects. 508, 514, and 521, and it does not appear that the construction of those sections can be very much aided by analogies drawn from sections of the English *Common Law Procedure Act* which have been referred to, dealing with arbitrations, because a specific rule has been laid down in the Code for dealing with arbitrations, probably grounded on reasons of public policy.

By sect. 508 it is laid down that the Court shall by order refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the order. In this case the order of reference made by the Court does not specify, directly, any time. It merely fixes a date for the hearing of the case by the Court, which is not in strict compliance with the terms of the section, though it might be sufficient. Their Lordships are of opinion that sect 508 is not merely directory, but that it is mandatory and imperative. Sect. 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if sect. 508 is to be merely treated as directory. In the present case, however, the Subordinate Judge repeatedly made orders enlarging the time, and in those orders fixed the time within which the award was to be made, although he did not do so in the original order of reference; and their Lordships are of opinion that it was competent for the Subordinate Judge to do so under sect. 514 of the Code, which enables the Court to grant a further time, and from time to time to enlarge the period, for the delivery of the award, in cases when it cannot be completed within that period from want of necessary evidence or from any other cause. The last order of enlargement made by the Subordinate Judge was on the 13th of March, 1885, extending the time to the 20th of March, 1885, and no longer. No award was delivered within that time, though one was delivered on the 24th of March, 1885, and the

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first question which appears to their Lordships to arise is whether it would have been competent for the Subordinate Judge to have extended the time after the award was made. Their Lordships are of opinion that it would not. When once the award was made and delivered, the power of the Court under sect. 514 was spent, and although the Court had the fullest power to enlarge the time under that section as long as the award was not completed, it no longer possessed any such power when once that time was passed. The Court did, however, receive the award delivered on the 24th of March, 1885, and a decree was made upon it by the Subordinate Judge, which was confirmed by the High Court. The objection now put forward for the Appellant is that this award is not valid. That contention has to support it the express statutory enactment that no award shall be valid unless made within the period allowed by the Court. The utmost period allowed by the Court was until the 20th of March, 1885, and therefore the award delivered on the 24th of March, 1885, was so delivered by arbitrators who no longer had any lawful authority to make it. Again, as a matter of fact, there was no enlargement of the time made by the Court after the 20th of March, 1885.

This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there, and the Judges were bound to take judicial notice of it.

In the case of *Chuha Mal* v. *Hari Ram* (1) Mr. Justice *Oldfield* lays down the law upon this subject very clearly. He says: "The award in this case was not made within the period allowed by the Court, and, consequently, it must be held to be invalid; that is, there was no award on which the Court could make a decree." That judgment appears quite in point in this case, and it is a judgment of which their Lordships entirely approve.

Upon these grounds, their Lordships will humbly advise Her Majesty to reverse the judgments of the Subordinate Court and the High Court, to declare the award invalid, and to direct that the suit shall be proceeded with, and that neither party shall be entitled to costs in either Court below from and after the date of

(1) Ind. L. R. 8 Allah. 548.

the first of the said judgments; and that the costs prior to that date shall await the issue of the case. The Respondents must pay to the Appellants the costs of this appeal. The reason for not giving the Appellant the costs in the Court below arises from the fact that their Lordships are of opinion that the point upon which this award is now held to be invalid was certainly not raised before the Subordinate Judge, nor, as far as appears, in the objections that were urged before the High Court.

Solicitors for the Appellant: *Barrow & Rogers.*
Solicitors for the Respondents: *Linklater & Co.*

FUZUL KARIM AND ANOTHER . . . . PLAINTIFFS;

AND

HAJI MOWLA BUKSH AND OTHERS . . . DEFENDANTS.

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Jan. 29, 30.
Feb. 21.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Mahomedan Law—Sunnis—Imam's right to conduct Service—Constitution of Mosque—Ceremonial.

In a suit by the Imam of a mosque to restrain the Defendants from interfering with the Plaintiff's right to conduct its service and from carrying on prayers therein under the guidance of an Imam appointed by themselves, it appeared that the parties were Sunnis, and that the points in dispute were whether the Plaintiff was entitled to introduce two Sunni observances to which the Defendants objected: (1.) The loud instead of the low-toned Amen; (2.) the performance of the Rafadain:—

Held (1.) that on the findings of fact (which in second appeal were conclusive) there was nothing in the constitution of the mosque which prohibited the ceremonial adopted by its Imam, and therefore the Plaintiff was within his right, and must be protected against the Defendants.

(2.) That the introduction of the observances in question into a mosque where they had not previously been used was not in violation of Sunni law or usage.

APPEAL from a decree of the High Court, passed on second appeal (December 6, 1887), reversing a decree of the Additional Subordinate Judge of *Tirhoot* (March 15, 1886), and restoring that of the 2nd Moonsiff of *Mozufferpore* (December 27, 1884).

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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The question was whether the Respondents had established their claim to carry on prayers in a Mahomedan mosque under the guidance of an Imam nominated by themselves, so long as there was a duly constituted Imam in charge of the mosque and in performance of the duties of his office.

The facts of the case and of the proceedings in the Court below are stated in the judgment of their Lordships. The following is the judgment of the High Court:—

"This is a declaratory suit brought by the Matwalis of the musjid in kusba *Tajpore* and the Imam to have it declared that they hold these offices; that they are entitled to carry on prayers as they carried them on at the time of filing the plaint; and further, that it be declared that the Defendants have no right to interfere with any of their official acts, but are merely entitled to visit the mosque at the time of prayer and to say prayers behind the plaintiff Imam.

"The answer of the Defendants was, that the mosque was a Hanifi mosque and had been so from time immemorial; that formerly the services and ceremonies in the mosque were carried on in the manner in which these ceremonies are performed by the followers of the Imam *Abu Hanifa*, and that latterly the Plaintiffs refusing to follow that Imam, became Wahabis and changed the ritual of the mosque.

"The Moonsiff found that the mosque was rebuilt about twenty-five or thirty years ago by one *Moulvi Abdool Wahab*, a former Moonsiff of *Tajpore*, by means of funds collected by the Mahomedans of that place, who are all Mahomedans of the Hanifi sect. He further held that no change took place till about seven or eight years ago, when certain young people, who had been educated at *Delhi*, began to preach the doctrine of *ghair-mokallid* in *Tajpore*, and converted the Plaintiffs to the religion described by the names Amil-bil-Hadis, Ghair-Mokallid or Wahabi; and he added that, in his opinion, there were broad distinctions and differences between the Hanifis and those Mahomedans who claim to be called Amil-bil-Hadis. He, therefore, limited the declaration to this, viz., that the Plaintiffs Nos. 2 & 3 were matwalis of the musjid, and he decided that the Plaintiff who claimed to be Imam and Moazzin of the mosque could not

compel the Defendants to say their prayers behind him, but, on the contrary, they were entitled to say their prayers as they had been said from the origin of the mosque.

"In appeal the learned Judge has discussed many things which, from the view that we take of the case, appear to be altogether irrelevant. In the first place, he discusses whether it was lawful for members of the Hanifi sect to say their prayers behind those who call themselves Amil-bil-Hadis. He next enters into a discussion whether they are respectable members of society, and finally he discusses whether it is lawful for members of the sect calling themselves Amil-bil-Hadis to perform the duties of an Imam or not.

"In our opinion, all these matters have nothing to do with this suit. The only questions we have to decide are, whether these Plaintiffs, who were appointed by members of the Hanifi sect, and who performed the duties of the mosque in accordance with the observances and ceremonies of that sect for twenty years, can now turn round and claim to have the right to discharge their duties in a different manner. No authority for any such proposition has been brought to our knowledge. The learned counsel who argued the case on behalf of the Plaintiffs, declined to enter into the matter, being one of great difficulty. *Primâ facie*, it appears to us that the Imam or Matwali should have performed his duties in the customary manner. It is for them to justify the change, and they have been unable to do so.

"We are, therefore, of opinion that the Lower Appellate Court was wrong in setting aside the decree of the First Court; and in decreeing the appeal, we restore the decree of the Moonsiff with costs."

Doyne, and *C. W. Arathoon*, for the Appellants, contended that the findings of the First Appellate Court must be accepted, inasmuch as no appeal therefrom lay to the High Court, and that consequently, the latter Court's judgment could only be sustained if it appeared that some law or usage having the force of law had been erroneously decided or overlooked by the Subordinate Judge. That Judge had found as facts that the mosque was not proved to be an Hanifi mosque, and that if it were there was

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nothing to shew that its founders had prohibited an Amil-bil-Hadis from praying in the mosque or acting as Imam therein. The Appellants were within their right so long as they were the constituted authorities in charge of the mosque, in acting in the manner complained of by the Respondents. They ought to be protected in their conduct of the worship and ceremonial, and the Respondents should be restrained from simultaneously carrying on a separate service. No change in the religion and no substantial innovation in the ritual had been shewn to have been effected by the Appellants, nor any conduct on their part which justified the proceedings of the Respondents. The findings of the Subordinate Judge were conclusive in favour of the Appellants, and there was no error of law shewn which justified the decree appealed from.

The Respondents did not appear.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

When the plaint in this suit was filed the Plaintiffs were the two present Appellants and one *Hafiz Mowla Buksh*. The last-named Plaintiff was the Imam and Moazzin of a mosque in *Tajpore*, and the two others were Mutwalis of the same mosque. The Defendants were twelve persons who worshipped at the mosque. The plaint alleged that the Defendants, being dissatisfied with certain variations in the ceremonial which the Imam had introduced, interfered with his performance of the service, and claimed to conduct the service in their own way, and otherwise misbehaved themselves.

The relief prayed was as follows :—

"(*a.*) That it be declared by the Court that the Plaintiff No. 1 is Imam and Moazzin of the musjid at *Tajpore*, pergunnah Saresa, and that Plaintiffs Nos. 2 and 3 are Matwalis thereof; and that as Imam and Matwalis the Plaintiffs have a right, as they have all along hitherto had, to deliver the Friday oration and perform the daily prayers before the congregation from the pulpit and mosulla.

"(*b.*) That the Defendants have no right to interfere there-

with, nor any to do the acts referred to in paragraph 5 of the plaint.

"(*c.*) That it be declared that the Defendants, as a sect of Mussulmans, have simply the right to visit the musjid at the time of prayer only, and to say prayers, led by Plaintiff No. 1; otherwise they have no right to visit the musjid with any other intention.

"(*d.*) That it be declared by the Court that in case the Defendants interfere with the rights of the Plaintiffs as Imam and Matwalis, and do the acts referred to in paragraph 5 of the plaint, the Plaintiffs have the authority to turn out all the Defendants, or any one who may do such acts, from the musjid."

The suit was therefore in the first instance a declaratory suit, but the plaint was amended by adding a prayer for substantive relief as follows:—

"That the Defendants may be prevented from interfering in any way in the Moazzin's right and the Imam's right enjoyed by the Plaintiff No. 1, and in the towliat right of the Plaintiffs Nos. 2 and 3, and that a prohibitory order may be issued to the Defendants, to the effect that the Defendants must not do any acts mentioned in paragraphs 4 and 5 of the plaint, within the mosque of the Plaintiff, nor should the Defendants enter the mosque of the Plaintiffs with that object."

In their written statement the Defendants did not deny that *Hafiz Mowla Buksh* had been Imam and Moazzin for twenty-five years, nor that the other Plaintiffs acted as Mutwalis, but they defended themselves by alleging in effect that the Plaintiffs had forfeited their offices by reason of heresy. The two material pleas are as follows:—

"Prior to this, the Plaintiff No. 1 was Moazzin and led people to prayer. But he has renounced his Hanifi religion and embraced the Wahabi religion. That being so, the Plaintiff No. 1 can by no means now, according to Mahomedan law and rule, claim to be Imam and Moazzin, and therefore he has no right to bring the suit.

"The Plaintiffs Nos. 2 and 3 are, on their own shewing, not Matwalis. They are certainly sons of the deceased *Matwali Kazi*

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Ramizuddin. But they can have, in Mahomedan law, no right to the matwaliship simply because they are sons (of the deceased Matwali). Besides this, the Plaintiffs Nos. 2 and 3 have renounced their previous and paternal religion and joined the Wahabi sect That being so, they have no right whatever to the management of the disputed musjid."

The Plaintiffs filed what is called "a refutation" of the Defendants' statements. It is not in the Record, and is probably immaterial except as a general denial of the matter urged in defence.

In the months of August, September, and November, 1884, three petitions were presented by eight of the Defendants, stating their regret at having been persuaded to take part against the Plaintiffs, and their wish that the Plaintiffs might obtain the decree they prayed for. It does not appear that any order was made for stay of proceedings against these converted Defendants, but by the time the suit reached the High Court the eight names had disappeared from the proceedings.

In the course of taking the evidence it became clear what was the real quarrel between the parties. The general charge against the Plaintiffs of having become Wahabis (whatever the Defendants may have meant by it) resolved itself into this, that they had adopted two observances which the Defendants think to be wrong: one being the pronunciation of the word "Amen" in a loud instead of a low voice, and the other the performance of Rafadain, which is a ceremonial gesture of raising the hands to the ears at a particular point of the service.

All the parties are, or claim to be, Sunni Mahomedans. *Hafiz Mowla Buksh* says, "I obey equally all the four Imams," which is the mark of the Sunni school. *Omed Ali*, the first Defendant, says, "Even now I would say prayers under the leadership of *Mowla Buksh* if he only gave up uttering 'Amen' loudly and raising his hands to his ears. . . . I call him a Wahabi because he utters 'Amen' and raises his hands, and says prayers standing with the two legs apart, and he crosses the hands on the breast." It is clear that the Defendants make no charge of false or heretical doctrine, except so far as it is to be inferred from the offending ceremonial; and it is the two first acts of worship

mentioned by *Omed Ali* to which the whole evidence and argument has been addressed. The two last are not mentioned again. The question is whether the use of the loud Amen and of Rafadain is inconsistent with *Hafiz Mowla Buksh's* retention of the office of Imam and Moazzin.

That it is consistent with his being a sound Sunni is clear, for both practices are prescribed by one or more of the four Imams whom the Sunnis follow. But the Defendants allege that the mosque was built by Sunnis of the school of *Abu Hanifa*, who, they say, prescribes the low-toned Amen and the omission of Rafadain. Thence they infer, first, no person who is not an Hanifi can properly be Imam, Moazzin, or Mutwali of the mosque; and, secondly, that to use the loud Amen and Rafadain is inconsistent with being an Hanifi. The Plaintiffs deny both these inferences.

Their Lordships have been careful to state the precise constitution and nature of the suit, because it appears to them that it has not always been sufficiently borne in mind. The next step is to see how it has been judicially dealt with.

After a decision by the Moonsiff that he had no jurisdiction to deal with the matter, which was reversed on appeal, the case was heard by the then Moonsiff in December, 1884. He took the views of the Defendants as regards the office of Imam and Moazzin, but he did not think that the Mutwalis were disqualified. The decree passed by him is as follows:—

"That the Plaintiffs Nos. 2 and 3 do continue to remain Matwalis of the musjid; that the Plaintiff No. 1 cannot be considered as Imam and Moazzin as against the contending Defendants, nor are the Defendants bound to follow his leadership in prayer; that the Defendants have every right to say prayers in the musjid in their own way behind their own Imam."

On appeal by the Plaintiffs the case was heard by the additional Subordinate Judge in March, 1866. It is important to see precisely what his findings are, because, so far as they relate to matters of fact, no appeal from them lay to the High Court. The material findings appear to their Lordships to be in substance as follows:—

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(*a.*) The Plaintiffs belong to a school known as Amil-bil-Hadis or Ahil-Hadis.

(*b.*) The Amil-bil-Hadis are Mahomedans, Sunnis, and members of the Sunnat Jamait.

(*c.*) There is no authority to say that an Amil-bil-Hadis cannot lead the prayer of an Hanifi.

(*d.*) The only difference is that the Amil-bil-Hadis perform Rafadain and say "Amen" in a loud tone.

(*e.*) That difference is no ground for a religious objection on the part of an Hanifi to pray behind an Amil-bil-Hadis.

(*f.*) The Amil-bil-Hadis follow the authority of the kias and the ijma, if not inconsistent with the Koran and Hadis, in which they do what every Mahomedan should do.

(*g.*) It is doubtful whether the mosque is an Hanifi mosque.

(*h.*) Granting that the founder was an Hanifi, still there is nothing to shew that he prohibited an Amil-bil-Hadis from praying in the Mosque or acting as Imam therein.

(*i.*) The Defendants are not entitled to pray behind an Imam of their own selection.

From these findings the necessary conclusions were that *Hafiz Mowla Buksh* was not disqualified to be Imam; that he was entitled to protection against the Defendants, and that the Moonsiff's decree must be reversed. This was done, and a decree made for the Plaintiffs according to the prayer of the plaint, with costs of suit.

The Defendants then appealed to the High Court, and the case was heard before a Division Bench in December, 1887. The Court discharged the decree of the Subordinate Judge and restored that of the Moonsiff. They considered that the Subordinate Judge had addressed himself to matters which were altogether irrelevant, and had nothing to do with the suit, viz., whether it was lawful for Hanifis to pray behind Amil-bil-Hadis, whether Amil-bil-Hadis are respectable members of society, and whether it is lawful for them to perform the duties of an Imam. Their ground of decision is thus stated:—

"The only questions we have to decide are, whether these Plaintiffs, who were appointed by members of the Hanifi sect, and who performed the duties of the mosque in accordance

with the observances and ceremonies of that sect for twenty years, can now turn round and claim to have the right to discharge their duties in a different manner. No authority for any such proposition has been brought to our knowledge. The learned Counsel who argued the case on behalf of the Plaintiffs declined to enter into the matter, being one of great difficulty. *Primâ facie*, it appears to us that the Imam or Matwali should have performed his duties in the customary manner. It is for them to justify the change, and they have been unable to do so."

From that decree the present appeal is brought. *Hafiz Mowla Buksh* died before the decision by the High Court, but leave was given to his two co-Plaintiffs to prosecute the appeal, though their own title as Mutwalis was affirmed by all the Courts. They have, however, a sufficient interest in maintaining the views of their school or party in the mosque, especially as it is stated in evidence that they appoint the Imam. Their Lordships must decide the points raised in the suit just as if *Hafiz Mowla Buksh* were the Appellant. The Defendants, now three in number, have not appeared. It is very unfortunate that such a case should be decided on an *ex parte* argument.

It is not apparent from the judgment of the High Court on what ground they considered that a second appeal was sustainable, or, in other words, what was the law, or usage having the the force of law, which the Subordinate Judge had decided erroneously, or had failed to decide. The most obvious meaning of their brief judgment is that their decision is rested entirely on the peculiar constitution or trusts of the *Tajpore* mosque. But that is a question of pure fact, at least in this case where no written evidence is forthcoming; and the findings of the Subordinate Judge are conclusive in the High Court, and also in this tribunal, seeing that the Defendants have not obtained any leave to appeal to Her Majesty in Council from his decree. His findings on this point, as stated above (*g*) and (*h*), are fatal to the Defendants' case, but the High Court appear to have paid no attention to them.

Though it is not competent to their Lordships on this appeal

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to go behind the Subordinate Judge's findings of fact, they think it right to say that, for the purpose of examining the case from other points of view, it has been their duty to study the whole of the evidence, and that they entirely agree with the Subordinate Judge that there is no evidence whatever that the mosque was intended for Hanifis only, and not for all Sunnis or for all Mahomedans, or that an Amil-bil-Hadis is prohibited by its constitution from being its Imam.

The judgment, however, may mean that there is some rule of law to the effect that when public worship has been performed in a certain way for twenty years, there cannot be any variance from that way, insomuch that the officiating minister who is guilty of a variance is *ipso facto* disqualified for his office. If that is the meaning of the judgment, their Lordships hold that it is not well founded in law. Indeed, it is not well founded in fact, because general uniformity of practice in the worship at this mosque is neither proved nor alleged, though the particular practices now objected to are comparatively recent. But, passing that by, it cannot be that an Imam should be so bound by his own or his predecessor's previous practice in worship that he cannot make the slightest variation from it in gesture, intonation, or otherwise, without committing an offence. Even a code of ritual can hardly be so minute as absolutely to exclude all individual peculiarity or discretion; and here there is no code of ritual at all. If the principle above stated were allowed, it would follow that the practice of a single Imam (for *Hafiz Mowla Buksh* had been in office for twenty years before the dispute began) might be so stereotyped as to become the constitution of the mosque, and that a single member of the congregation might, against the wishes of the rest, insist that no variation however innocent or however minute should be made. The question in each case of dispute must be as to the magnitude and importance of the alleged departure. To that question the Subordinate Judge has very properly addressed himself, but the High Court have set aside all his findings as irrelevant, and have declined to examine the points to which the pleadings, the evidence, and the judgments of the two first Courts are mainly addressed.

Their Lordships cannot follow this course, because the judgment in favour of the Defendants might be rested, as the Moonsiff did in fact rest it, on more general grounds than the private constitution of this mosque, or the obligations resulting from the practice which has prevailed in it, and those grounds must be examined.

Before quitting this point, mention should be made of the case *Ata-Ullah* v. *Azim-Ullah* (1), in which the High Court of that province held that a mosque, being dedicated to God, is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. If that principle were accepted, it would be decisive of the present case, so far as it rests on the judgment of the High Court. But it has not been propounded by Mr. *Doyne*, nor do the facts of this case properly raise the question, because it does not appear that this mosque ever was intended to be appropriated to any particular sect. Their Lordships, therefore, express no opinion upon it.

Turning to the question most discussed in the two lower Courts, it appears to be this—whether the introduction of the loud Amen and Rafadain (which is the offence charged against *Hafiz Mowla Buksh*, and which is the reason why he calls himself Amil-bil-Hadis, and his opponents call him Wahabi) shews such a change of tenets, or is in itself such an important departure from custom, as to disqualify the Imam from acting in a mosque where those ceremonies had not previously been used. If this question is to be answered in the affirmative, it must be on the ground either of general express rule of Mahomedan law, or of the growth of customs separating different schools in so marked a way that the followers of one school cannot properly worship with those of another.

As regards general law their Lordships have not been referred to any authoritative code of ritual for Sunnis, such as is the statutory rubric of the Church of *England*. In the Hedaya there appears to be a long chapter or book on Prayer, which would probably expound the views of *Abu Hanifa*, and those of his two principal disciples *Abu Yusuf* and *Abdoolla Mohammed*, as they were understood in the sixth century of the Hegira.

(1) Ind. L. R. 12 Allah. 494.

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But Mr. *Hamilton*, who was employed by *Warren Hastings* to translate the Hedaya, did not translate the book on Prayer, because it seemed to him that it could not afford any manner of assistance in decisions concerning matters of property. And so far as their Lordships have been informed there is no translation of it from the original Arabic; certainly there is none into English. Nor has any text been produced from any source to shew that one who follows *Abu Hanifa* does any wrong in performing ceremonies recommended by the other Sunni Imam, or thereby cuts himself off from communion with other followers of *Hanifa*. There have been two cases in the High Court of *Allahabad* in which disputes have arisen about the intonation of the word Amen. One has already been referred to on another point. The other was a criminal case, the *Queen-Empress* v. *Ramzan* (1), and the decision turned on the question whether those who said Amen aloud said it in an indecent way, and with intention to annoy the others. In both cases Mr. Justice *Mahmood* entered at length into the question how Amen should be pronounced. He states that though *Hanifa* recommends a low tone, the other three Imams recommend a loud tone, and gives it as his opinion that though it is imperative to say Amen, there is no authority to regulate the tone of voice. In the later of the two cases the first Court treated both the loud Amen and Rafadain as open to all Sunnis to practise. Their Lordships cannot find that there is any general law on the point for Mahomedans, or for Sunnis, and must hold that there is none.

Their Lordships then come to inquire what is the usage among Sunni communities. That ground is completely covered by the findings of the Subordinate Judge, as above set forth, and if the questions are questions of fact his findings are conclusive. But their Lordships will not on an *ex parte* argument take it as concluded against the Defendants that this inquiry may not involve usage having the force of law. They have therefore thought it right to go into the evidence, with the result that they agree with the Subordinate Judge.

The Sunnis follow the four Imams, who appear to agree

(1) Ind. L. R. 7 Allah. 461.

in placing the sources of their law in the following order:— 1, *The Koran;* 2, *The Hadis*, or traditions handed down from the Prophet; 3, *Ijma*, or concordance among the followers; and 4, *Kias*, or private judgment. Beyond that the four differ in many details, including the loud Amen and Rafadain. No Imam can follow all four in everything. But the followers of any are equally orthodox Sunnis.

This statement, which is common in the text books, and is supported by the evidence of *Nurul Hassan*, is also illustrated strongly by the learned men of *Delhi* who have given evidence. A number of them, upwards of thirty, framed a Fatwa in the year 1880, in which they appealed solemnly to their co-religionists not to quarrel about minor matters of difference, the tone of Amen and Rafadain being among them. Five of them were examined. One says he does not follow any one of the admitted Imams particularly, evidently meaning that he is at liberty to follow an eclectic process among them. Another says he follows all four, which must mean in essentials, for he cannot do so in many details, including those now under consideration. A third says he follows all four, and the Hadis. A fourth says he follows *Abu Hanifa*; and yet he is a party to the Fatwa, which treats the tone of Amen and Rafadain as matters on which different courses may be followed with equal propriety.

Nurul Hassan is the Moonsiff before whom this case came in some of its earlier stages, and who would have tried it if the Plaintiffs had not prayed that it might be transferred to another Judge, because they wished to have his testimony. He is a learned man, who knows Arabic. He is of the Hanifi sect or school, uses the low Amen, and does not use Rafadain. He agrees with the Fatwa, and speaks highly of some of its signatories. He states that "those who do not say the word Amen, and do not raise their hands, can say their prayer behind those who do the same." And he quotes a number of authorities to support his opinion.

Sheik Ahmedulla was one of the subscribers to the building of the mosque. He was the first witness called to support the Defendants. But he says that he himself prays behind an

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Amil-bil-Hadis and behind an Hanifi also. And having been to Mecca, he says that there "the followers of all four Imams say prayers behind an Amil-bil-Hadis, and the Amil-bil-Hadis say prayers behind the followers of all four Imams." Also that "at *Tajpore*, and in its neighbourhood, the Hanifis say prayers behind an Amil-bil-Hadis."

What this witness says of Mecca accords with the statement of Mr. Justice *Mahmood* in the *Empress* v. *Ramzan*. He says that in the Kaaba all the four schools are at liberty to pray, from which he justly infers that the prayers of none are heterodox. And what the same witness says of *Tajpore* would seem to be confirmed by the observation that in this very mosque, where the congregation is said to be largely Hanifi, it does not appear that a single one of the worshippers, except the Defendants who appealed to the High Court, objects to the way in which *Hafiz Mowla Buksh* conducted the service.

Against all this evidence of the opinions of learned and devout Mahomedans, and of the actual practice of Mahomedan worshippers, what is there on the other side? The evidence is an absolute blank. No book, no opinion, no practice of any community of worshippers is cited. There is no ground given to dissent from the findings of the Subordinate Judge, nor from his conclusion that the Plaintiffs were entitled to relief. In one point he has followed too closely the prayer of the plaint. Paragraph (*d*) asks for a declaration that the Plaintiffs have the authority to turn out the Defendants when they interfere. The Court ought not to make such a declaration. The Plaintiffs must rely on the prohibitory order or injunction for which they pray, and must enforce it, as they may be advised, in each case that arises. The High Court should have varied the Subordinate Judge's decree by refusing to grant the declaration asked by paragraph (*d*), and subject to that should have dismissed the Defendant's appeal, with costs. That is the decree which their Lordships will humbly advise Her Majesty to make now, in lieu of the decree of the High Court, which should be discharged. The Respondents must pay the costs of this appeal.

Solicitors for the Appellants: *T. L. Wilson & Co.*

MUHAMMED NAWAZ KHAN AND ANOTHER . PLAINTIFFS;

AND

ALAM KHAN . . . . . DEFENDANT.

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Jan. 30, 31;
Feb. 28.

ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.

Arbitration and Award—Civil Procedure Code, 525, *s.* 13—*Order refusing to file Award—Powers of private Arbitrator—Construction of Terms of Reference.*

In a suit by two sons of a deceased Mahomedan to recover their shares in their father's estate from their brother, the Defendant pleaded that he was entitled to the said estate under an award in his favour made on a submission to which the Plaintiffs were parties; but it appeared that the Civil Court had refused an application under sect. 525 of the Civil Procedure Code to file the same:—

Held, that this order was not a decision as to the validity of the award within the meaning of sect. 13.

Where a dispute relating to land and the right of succession thereto was referred by the members of a Mahomedan family to a private arbitrator selected by reason of his knowledge of the circumstances of the family, without any stipulation that he was to be controlled in his decision by any custom or Mahomedan law, and the arbitrator decided on the broad view of giving effect to what he conceived to be the intention of the deceased father of the parties:—

Held, that this could not be relied on as misconduct, and that such decision was within the right of the arbitrator.

APPEAL from a decree of the Chief Court (Dec. 12, 1887), reversing that of the Subordinate Judge of zillah *Bannu* (Jan. 15, 1886).

The facts are stated in the judgment of their Lordships.

C. W. Arathoon, for the Appellant, contended that the Order of the 15th of December, 1885, which declared the award to be invalid and refused a decree upon it, operated as *res judicata* under sect. 13 of the Code of Civil Procedure. It was a final order, no appeal having been made from it. Otherwise the burden was heavily on the Respondent to shew that that decision was wrong. On the face of the award it appears that the arbitrator

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, and SIR RICHARD COUCH.

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was prejudiced in favour of the Respondent. The award moreover was not justified by Mahomedan law or by any proved custom.

The Respondent did not appear.

1891 Feb. 28.

The judgment of their Lordships was delivered by

LORD MORRIS:—

The Plaintiffs and Appellants are two of the sons of *Maddat Khan*, who died on the 6th of June, 1883, leaving four sons and the children of a fifth son him surviving. The Defendant *Alam Khan* is one of the sons.

The Plaintiffs claim two-fifths of their father's property, moveable and immoveable. The moveable inheritance is not in dispute, the Plaintiffs being clearly entitled to two-fifths thereof. They would be also *primâ facie* entitled to the same proportion of the immoveable property. After the death of *Maddat Khan* the Plaintiffs, for themselves and purporting to be guardians of the sons of their deceased brother, entered into an agreement, dated the 20th of September, 1883, with the Defendant, who also purported to be the guardian of his younger brother, *Fatteh Khan*, whereby it was agreed to appoint a private arbitrator for a decision of the dispute relating to their father's lands and the office of lambardar, and that *Mian Sultan Ali*, who was intimately connected with the circumstances of the family and was their pir, should act as the private arbitrator, and they agreed to accept whatever the said *Mian Sultan Ali* might decide in respect of the dispute between them. The said arbitrator soon after made his award, whereby he found in effect that the Plaintiffs were not to get any land of the deceased except the portion given to them by him in his lifetime, and that the Defendant *Alam Khan* should remain the owner of the whole of the remaining landed property. He also awarded to *Alam Khan* the office of lambardar.

Shortly after *Alam Khan* applied to the Extra Assistant Commissioner, Mr. *Homan*, to have the award filed, pursuant to sect. 525 of the Civil Procedure Code, and on the 5th of November, 1883, that official decreed that the award be filed in Court. Against that

decision the Plaintiffs in the present suit appealed, upon several grounds; first, that Mr. *Homan*, by reason of the value of the subject matter, had no jurisdiction; next, that the award disposed of the lambardari, a matter over which the arbitrator could have no jurisdiction; and also for the misconduct of the arbitrator. The Civil Judge held that the award could not be filed, by reason of the pecuniary limit of the Lower Court's jurisdiction, and by reason of the Lower Court having no jurisdiction to deal with the lambardari, and remanded the case to the Court of the Deputy Commissioner, Colonel *Connolly*, who transferred the case to the Subordinate Judge, *Nawab Alladad Khan*, who by his order of the 15th of December, 1885, decreed that the claim of the Defendant *Alam Khan* to file the award should be dismissed. His grounds for the said decree are set forth in his judgment. Some of them are entirely at variance with the function of a judge. He states that the arbitrator misconducted himself, in making the award contrary to the custom of the parties and the Mahomedan law, and that he, the Judge, knew that the arbitrator was an intimate friend of *Alam Khan*, and that he had consequently made his award in *Alam Khan's* favour. *Alam Khan* thus failed to have the award filed. On the same day the Plaintiffs filed their plaint, which is the commencement of the present suit. *Alam Khan* on the 22nd of December, 1885, put in his statement in writing in answer to the Plaintiffs' claim. He therein relied on the award of *Mian Sultan Ali*. Issues were settled, and amongst them is No. 10, the issue on the result of which the decision of this case rests, namely, what is the legal effect as against the Plaintiffs of the arbitrator's award. The case came on for hearing before the same Subordinate Judge, who, in effect, re-affirmed his former judgment on the application of *Alam Khan* to file the award. He decided that the award was invalid. The Defendant appealed to the Chief Court of the *Punjaub*. That Court reversed the decision of the Subordinate Judge. They held that the award was valid as against the Plaintiffs, and dismissed their claim in respect of *Maddat Khan's* landed property.

Their Lordships concur in the judgment of the Chief Court.

The first contention on the part of the Appellants before their

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Lordships, has been that the decree of the Subordinate Judge, dismissing the claim of *Alam Khan* to file the award, pursuant to sect. 525 of the Civil Procedure Code, has the effect under sect. 13 of the same Code of a *res judicata*. One of the Judges of the Chief Court says that that contention was not very strongly pressed before them. It has been most strenuously urged before their Lordships, who cannot accede to it. Though the application under sect. 525 was refused, that merely left the award to have its ordinary legal validity. It could not be successfully contended that an award is not valid because the party in whose favour it was had never applied to have it filed in Court. Can then the refusal to file, or of an application made to do so, have the effect that the award can never be relied upon in any suit relating to the subject matter dealt with by it? Their Lordships are of opinion that sect. 13 has not that effect. It enacts that "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court." Sect. 525 says that the application to file the award is to be registered as a suit. Assuming for the purposes of this argument, that such an application is a suit such as is contemplated in sect. 13, what is decided in it? Only that the award ought not to be filed. That question is not raised in this suit, so that their Lordships have not to discuss how far the refusal is conclusive on that point, or how far the circumstance that one of the two matters referred was beyond the control of the arbitrator, constitutes an objection to filing the award. In order to make the refusal to file an award a binding judgment against its validity on the ground of the partiality of the arbitrator it would be at least necessary to shew that the point was definitely raised and put in issue and made the subject of trial. The validity of the award as an award, was never directly and substantially at issue in that application. In this action respecting the land alone, the award can be separated as to it from the office of lam-

bardar. Consequently, their Lordships are of opinion that the contention of *res judicata* is unsustainable. The Plaintiffs then rely on misconduct of the arbitrator as invalidating his award. There is no independent case or testimony to sustain or, indeed, to give colour to such a charge. They merely rely on the award itself as shewing such partiality and making such statements as to amount to misconduct. That contention seems to be mainly founded on an entire misconception of the agreement to arbitrate. It was not an agreement that the arbitrator was to be controlled in his decision by any custom or Mahomedan law, or otherwise. It was an agreement to refer the matter in dispute generally to his decision. He appears to have decided according to what he conceived was the wish and intention of the deceased *Maddat Khan*. He was within his right in so doing. Some criticisms have been offered on some of the reasons assigned by the arbitrator for arriving at his decision. These criticisms, even if justified, could not amount to any proof of misconduct. The arbitrator appears to have acted on the broad view of giving effect to the deceased's intentions. He was selected by reason of his knowledge of the circumstances of the family. Their Lordships see no ground for imputing misconduct to him. They will humbly advise Her Majesty to affirm the judgment of the Chief Court of the *Punjáub*.

Solicitors for the Appellants: *T. L. Wilson & Co.*

J. C.* 1890 — Nov. 27, 28; Dec. 2, 3, 4, 5, 10, 17 1891 — Jan. 24.

PEACOCK AND OTHERS . . . . . PLAINTIFFS;

AND

BYJNAUTH AND OTHERS . . . . . DEFENDANTS.

GRAHAM & CO. . . . . DEFENDANTS;

AND

BYJNAUTH AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Law of Lien—Principal and Banian—Rights of Consignors.

Where a banian claimed against the consignors of his principal a lien on the consignors' goods in the principal's godowns, and also on goods on board ship which the consignors claimed to stop *in transitu*:—

Held, that the banian had no lien even against his principal either by law or custom, that the evidence failed to prove an oral agreement to that effect, and that no course of dealing was proved from which such agreement could be inferred. Consequently he had no lien against the consignors.

Where sales of goods consigned have been in good faith effected by a banian, and the proceeds have been duly brought into account between him and his employers; *held*, that the consignors of such goods cannot afterwards hold the banian accountable to them in respect thereof.

APPEAL in the first case from a decree of the High Court (March 2, 1885), dismissing a suit by the Appellants against the Respondents and *Caralambus Tambaci* and the trustee in bankruptcy of his estate.

Appeal in the second case from so much of a decree of the same Court, on the same date, as was in favour of the Respondents in a suit brought by them against the Appellants and the firm of *Hoare, Miller & Co.*, the Commissioners for making improvements in the port of *Calcutta*, the said *Tambaci* and his trustee.

The Appellants, *Peacock, Mollison & Co.*, were a firm which since 1875 traded in *Manchester* as merchants, shippers and commission agents. *Paul Tambaci* traded in like manner at *Manchester* as *Paul Tambaci*, at *Calcutta* as *Paul Tambaci & Co.* His son *Caralambus* was manager for his father in *Calcutta* till 1877, and was partner with his father from the 1st of January, 1877 till the death of his father in 1880, from which date he alone

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

carried on the business both at *Manchester* and in *Calcutta* till his bankruptcy in 1882. The Respondents were a firm trading as banians under the firm *Byjnauth*. From the 1st of January, 1877, to the bankruptcy in 1882, the Respondents were the banians of *Paul Tambaci & Son*. The other Appellants, *Graham & Co.*, were in 1882 the *Calcutta* agents of *Peacock, Mollison & Co.* The said *Hoare, Miller & Co.* were the *Calcutta* agents of the S.S. *Knight of St. Patrick*, hereinafter mentioned.

Peacock, Mollison & Co. in their suit (No. 557 of 1882) prayed to recover certain specified goods in the godowns of *Caralambus Tambaci*, to whose firm those goods were alleged to have been consigned for sale on account of the consignors, but on which the Respondents claimed to have a lien for advances made to *Tambaci*. The Respondents *Byjnauth* sued (No. 552 of 1882) to obtain possession of fifty-six bales of goods marked *P. T. & C.*, which had been shipped by *Peacock & Co.* by S.S. *Knight of St. Patrick*, and landed on the jetties of the Port Commissioners, who, by direction of the Appellants, *Graham & Co.* (as agents for the firms of *Peacock* and *Hoare Miller*), refused to deliver them up. The Respondents claimed the goods, being holders of the bills of lading relating thereto, as security for an advance specifically made thereon.

Other suits arose out of the bankruptcy of *Tambaci*, and the judgment of the High Court (*Cunningham* and *Wilson*, JJ.) was given in all of them. The suit 557 of 1882 was dismissed, so far as it sought for an account of the goods sold and accounted for to *Caralambus Tambaci* (estimated in the plaint at Rs.1,70,000), and the Court declared that the Respondents were entitled to the goods marked *P. T. & C.* in the godowns of *Caralambus* at the time of his bankruptcy. In No. 552 of 1882, the Court declared that the banians were entitled to the fifty-six bales claimed or the sale proceeds, thereby denying the right claimed by *Peacock, Mollison & Co.* to stop the goods *in transitu*.

The material portion of so much of the High Court's judgment as related to *Peacock's* suit (No. 557 of 1882) is as follows:—

"The issues in this case are:—

"First, the general question whether as between *Tambaci* and *Byjnauth*, the latter had a lien on the goods in the godowns, on

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which we have already expressed our opinion in the affirmative;

"Secondly, whether as to each class of goods that lien is good against *Peacock, Mollison & Co.*, regarding them as the owners of the goods;

"Thirdly, whether in respect of the $^{P}_{C}{}^{T}$ goods *Peacock, Mollison & Co.* are entitled to sue;

"Fourthly, a similar issue as to a one-third share in such of the $^{P}_{C}{}^{M}$ goods as were shipped on the three-thirds account;

"Fifthly, whether the banian is liable to account to *Peacock, Mollison & Co.* for the proceeds of goods sold and already accounted for to *Tambaci*.

"With reference to the second question, we have given our reason for holding that in the case of the *P.* mark, the $^{P}_{C}{}^{T}$ and the $^{P}_{C}{}^{M}$ goods, *Byjnauth* knew them to be *Peacock, Mollison & Co.'s* goods, and the interests of the several persons concerned in them. It remains to consider whether his lien is protected by sect. 178 of the *Contract Act*. It is so unless the circumstances were such as to raise a reasonable presumption that *Tambaci* was acting improperly in making the pledge he did. We are far from saying generally that the knowledge by a pledgee that his pledgor is not the owner of the goods pledged, but an agent for sale, of necessity invalidates the pledge. To say this would be to ignore the 'usual and ordinary course of business' on which the 5 & 6 Vict. c. 39, was based. But the pledge, to be good, must be one presumably made for the benefit of the principal. It can never, we apprehend, be right for an agent to pledge the goods of a principal to secure the balance due by him on his own general account with the pledgee. In such a case knowledge that the pledgor is an agent is therefore, we think, knowledge that in so pledging he is acting improperly. In *Leuckhart* v. *Cooper* (1) a custom giving such a general lien was held to be bad in law; and in *Kaltenbach* v. *Lewis* (2) the reasons why such a general lien is objectionable are clearly pointed out. We think, therefore, that as to the $^{P}_{C}{}^{T}$ and $^{P}_{C}{}^{M}$ goods the title of *Peacock, Mollison & Co.* must prevail.

"The case as to the *P. T. & C.* goods is different. Those

(1) 3 Bing. N. C. 99. (2) 24 Ch. D. 54, at p. 59.

goods, as we have said, we find to have been *Tambaci's* goods, subject to a trust or appropriation of the goods and their proceeds. We have found also that *Byjnauth* had no notice of this arrangement. It follows, in our opinion, that his lien upon those goods is valid.

"The special point raised as to the $^{P}_{C}{}^{T}$ goods is this. Those goods were not actually the goods of *Peacock, Mollison & Co.*, but of a manufacturer on whose behalf they consigned them. And it was contended that they cannot maintain this suit, at any rate without the owners being made parties to the suit. As an objection to the suit for want of parties we cannot entertain this contention. Any such objection must, by sect. 34 of the *Procedure Code*, be raised before the first hearing. This was not so raised. So that on this point we have only to say whether the Plaintiffs have shewn any cause of action in themselves as against *Byjnauth*. We think they have. As between *Peacock, Mollison & Co.* and *Tambaci*, the former were the consignors of these goods and the principals in the transaction; *Tambaci* could not have disputed their title. *Byjnauth*, who takes from *Tambaci*, and with notice, cannot, we think, stand in any stronger position than *Tambaci* would have stood.

"A similar point was raised with regard to the manufacturer's one-third share of such of the $^{P}_{C}{}^{M}$ goods as were shipped on what was called the three-thirds account. To this there seem to us two answers,—one, that which we have just given as to the $^{P}_{C}{}^{T}$ goods; secondly, those goods were specifically appropriated to meet the bills drawn against them. And that is a sufficient equitable interest to give a right to sue: *Lutscher* v. *Comptoir d'Escompte de Paris* (1); *Ranken* v. *Alfaro* (2).

"The question which remains is as to the claim of *Peacock, Mollison & Co.* to hold *Byjnauth* accountable for goods already sold and accounted for in due course to *Tambaci*.

"As to this, we think the claim cannot be supported. There are only three grounds, so far as we are aware, on which a principal has been held entitled to sue a sub-agent employed by his agent."

The first is title, whereby he may follow his property in the hands of the sub-agent if he finds it there. This was the ground

(1) 1 Q. B. D. 709. (2) 5 Ch D. 786.

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of decision in the House of Lords in *Mildred* v. *Maspons* (1). And on this ground we have held *Peacock, Mollison & Co.* entitled to recover certain of their goods.

The second ground is privity of contract. This was the ground of decision in the Court of Appeal in the case just referred to (2). There is no such privity here. The position of the banian of a *Calcutta* firm, which firm receives goods for sale on behalf of principals in *Europe*, was considered in 1853 in *Orr Ewing* v. *Govind Chunder Sein* (3). That was a suit by *Glasgow* manufacturers, who had consigned goods to a *Calcutta* firm for sale, against the banian of the *Calcutta* firm, in which the Plaintiffs sought to recover from the banian the price of the goods. He had sold the goods and received the price, and had been debited with the amount in the general account between him and his employers, in exactly the same manner as *Byjnauth* was in the present case. At the trial the Court found, amongst other things, that there was no privity between the banian and the *Glasgow* house. A rule *nisi* having been obtained to set aside the verdict or for a new trial on several grounds, that rule was discharged. In the judgments the position of a banian was much considered. Thus Sir *L. Peel*, C.J., says (4): "The mode of dealing between the factors and their banian appears to have been this: They looked to him for payment, and when he had made the sales and the moneys due were payable, but before the price was paid, he was debited with this price, and gave credit to them in account for the amount *minus* his commission. The defendant was not the buyer of the goods, though the *Calcutta* house looked to him substantially for the price of them. The form of the contracts and the commission shew this. According, then, to this course of dealing his receipts of the money on the sales effected by him as banian would be a receipt of money not to the use of the foreign principals, but simply a receipt according to the course of dealing between him and his principals, the *Calcutta* house, and independently of any pledge or lien under the *Factors Act*." And again (5): "The position of

(1) 8 App. Cas. 874.
(2) 9 Q. B D. 530.
(3) Boul. 534.
(4) Page 539.
(5) Page 544.

things here is peculiar; the interposition of such a person as a banian between the factor and the buyers is not known in *England*; it is not universal here, though more common, and it must be presumed that one who is in the habit of remitting goods to this market for sale by an European house sanctions so very general and almost universal a course of trade, which the peculiar state of circumstances renders, if not absolutely necessary, yet convenient and expedient. Such a person cannot properly be described as a servant or clerk, though the general presence of him at the place of business of his principal might seem to give his connection with the agent at first view that appearance. He is rather a sub-agent of a peculiar kind. The banian in the case, by the course of dealing between him and his principals, became liable as a *del credere* agent. Consequently, he could be called upon to pay though he had been guilty of no fault or neglect. The giving credit in account between him and his principals, the agent, was, in the absence of fraud, equivalent to payment, and therefore his receipt of the moneys after such accounting was really, by virtue of the bargain between him and the agents, a receipt to his own use, and not in any manner in fraud or derogation of the right of the distant principal, but in pursuance of a contract effected within the scope of his own agent's authority and for the benefit of the principal himself."

This case is really much stronger than the many cases in *England* in which it has been held that no privity existed between foreign principals and English sub-agents, such as *New Zealand and Australian Land Company* v. *Watson* (1); *Kaltenbach* v. *Lewis* (2), because the banian is in the permanent employment of a *Calcutta* firm.

The only remaining ground on which a sub-agent could be made liable to account to the principal for goods sold through the sub-agent is fraud, or something equivalent to fraud. The law applicable in *India* upon this point is now embodied in sect. 192 of the *Contract Act*. This section, which seems to us for this purpose substantially in accordance with the law in force before the passing of the *Contract Act*, says: "The sub-agent is responsible for his acts to the agent, but not to the principal,

(1) 7 Q. B. D. 374. (2) 21 Ch. D 51.

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except in cases of fraud or wilful wrong." The only question, therefore, is whether any fraud or wilful wrong has been shewn. We cannot see the slightest pretext for such an imputation. So far as the sale and delivery of the goods is concerned, that was clearly in accordance with the object for which they were sent to *Calcutta*. As to *Byjnauth's* mode of accounting for the price, we have not to inquire whether, if he had been *primâ facie* accountable to *Peacock, Mollison & Co.* either for the price as purchaser, or for the sale-proceeds as their agent, he could have discharged himself by shewing a settlement in account with *Tambaci*. The question is whether, he not being *primâ facie* accountable, anything has occurred to make him so. Now the mode in which he accounted was that in which he was bound to account, and had been bound ever since his employment commenced in 1873. It was a mode of dealing which we know from *Orr Ewing's case*, already cited, to have been prevalent in *Calcutta* for thirty years at least. As between *Byjnauth* and *Tambaci* the course of business went on for nine years, during which time *Byjnauth* made very large advances on the faith of it, a due proportion of which found its way into *Peacock, Mollison & Co.'s* pocket. Throughout those years *Byjnauth* never had reason to suppose that any remittance to *England* was in arrear. And we now know from *Peacock, Mollison & Co.'s* own witnesses that their remittances were received with almost absolute regularity down to a date immediately before the bankruptcy. A clearer case of perfect good faith it is difficult to imagine.

It follows that, in our opinion, *Peacock, Mollison & Co.* have shewn a good title to the $^{P.\ T.}_{C.}$ goods; that to those of the $^{P.\ M.}_{C.}$ which were theirs alone they are entitled on that ground; and that to the remaining $^{P.\ M.}_{C.}$ goods, those on joint account and those on three-thirds account, they are entitled in part by virtue of ownership, and as to the whole by reason of specific appropriation to meet their bills of exchange. Under the arrangements made for sale of the goods, *Byjnauth* will have to account to *Peacock, Mollison & Co.* for those goods.

As to the *P. T. & C.* goods, *Byjnauth's* lien is good against *Peacock, Mollison & Co.*; and the claim of the latter to an account of goods sold and accounted for to *Tambaci* fails altogether.

And the portion of that judgment which relates to suit No. 552 of 1882 is as follows:—

"This suit relates to certain of the goods which arrived in *Calcutta* by the *Knight of St. Patrick*. As has been pointed out, that ship arrived on the 14th of September, 1882. The goods on board of her consisted of ten bales *P. X. T*, eight bales *P. T. & C.*, fifty-five bales *P. T. & C.*, and twenty-four cases *P.* mark goods. The bills of lading were indorsed and made over to *Byjnauth*, and he obtained delivery of the ten bales *P. X. T.* goods, and of seven out of the eight bales *P. T. & C.* But before he could obtain delivery of the remaining goods, they were stopped by *Graham & Co.*, acting under instructions from *Peacock, Mollison & Co.*

"About the remaining one bale out of the eight of *P. T. & C.*, there is no dispute; *Byjnauth* is clearly entitled to it. The controversy is as to the fifty-five bales *P. T. & C.* and the twenty-four cases *P.* mark.

"As to the latter, the reasons which we have given fully in *Peacock, Mollison & Co.'s* suit for holding that *Byjnauth* has no lien on the goods which he knew to be theirs would apply to these goods had they been in the godowns. And he can certainly have no better title, because they were stopped before they reached the godowns.

"With regard to the *P. T. & C.* goods, an issue arises entirely different from any that has arisen in any of the previous cases, namely, whether, as between *Byjnauth* and *Peacock, Mollison & Co.*, the latter had a right to stop and did effectually stop the goods *in transitu*.

"The position of *Peacock, Mollison & Co.* with respect to these goods we have already pointed out. They were agents who bought in *Manchester*, with their own money or on their own credit, and shipped to *Tambaci's* house in *Calcutta*. We think, therefore, that, according to the rule laid down in *Feise* v. *Wray* (1), and often acted upon since, they may, for the present purpose, be regarded as vendors with the right to stop *in transitu*. It was suggested, indeed, that the words 'a seller' in sect. 99 of the *Contract Act* alter the law so as to exclude persons in such a position. But we do not think that is so.

(1) 3 East, 93.

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"It was not denied that all other conditions requisite to entitle *Peacock, Mollison & Co.* to stop *in transitu* existed; nor was it questioned that they did in fact stop the goods before the *transitus* was over. The only question raised was, whether the bill of lading of these goods was indorsed to *Byjnauth* under such circumstances as to defeat the right to stop.

"The nature of *Byjnauth's* advances has been already considered. The legal effect of the transaction is now governed in this country by sect. 103 of the *Contract Act*: 'When a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods *in transitu*.'

"In connection with pledges and liens one distinction is familiar, the distinction between a pledge for an existing debt and a pledge for a new advance. The words 'an advance made upon it' plainly require that the pledge of a bill of lading, in order to defeat the right of stoppage *in transitu*, shall be as security for a new advance, not for a pre-existing debt. The Legislature has thus adopted for this country the view taken by the Privy Council in *Rodger* v. *Comptoir d'Escompte de Paris* (1) and *Chartered Bank of India* v. *Henderson* (2), and not that since taken by the English Court of Appeal in *Leask* v. *Scott* (3).

"But the section requires the advance for which the bill of lading is pledged to be 'made *specifically* upon it.' The construction of these words is by no means free from doubt. It was argued that they are pointed at the distinction between a particular lien on certain goods for a particular advance, and a general lien upon all goods to secure advances generally, or a floating balance; and it was contended that they require that there shall be a particular advance of a sum or sums on the security of the particular bill of lading in question apart from any other security. If this were the meaning of the words, the condition is not complied with in the present case. But we do not think the words of the section constrain us to take so strict a view; and the

(1) Law Rep. 2 P. C. 393. (2) Law Rep. 5 P. C. 501.
(3) 2 Q. B. D. 376.

policy of the law is to protect *bonâ fide* dealings with bills of lading in the ordinary course of business. We think the requirements of the section are complied with when it is shewn that any sum is advanced on the terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bill of lading may have been intended to be security not only for the particular sum or sums advanced upon it, but also for some antecedent liability. Reading the section in this sense, we think that *Byjnauth* is entitled to hold the fifty-five bales of *P. T. & C.* goods as security for all the sums advanced by him after the arrival of the particulars of shipment by the *Knight of St. Patrick.*"

Asquith, Q.C., and *Smyley* (*Roskill*, with them), for the Appellants, contended that the evidence failed to prove that the respondents had any lien even against their principal, *Tambaci*, and still less as against them (the Appellants) in respect of the goods marked *P. T. & Co.*, which were in the godowns when *Tambaci* suspended payment. The High Court was wrong in coming to a conclusion in favour of the lien claimed. Further, it was wrong in holding that the Respondents were not bound to account to the Appellants for all the goods consigned to *Tambaci* which bore the marks enumerated in the plaints and which had been sold and delivered by the Respondents as *Tambaci's* banians before *Tambaci's* suspension of payment. In general terms there were three classes of goods to which the High Court Judgment related; the "lien account" goods, the "joint account" goods and the "pure consignment goods." The first were marked *P. T. & Co.*, and had mostly been sold prior to *Tambaci's* suspension. The other two had been invoiced by the Appellants direct to the *Calcutta* branch of *Tambaci's* firm; the former for realization on account of parties interested in several cases, three in number, viz., the Appellants *Tambaci* and the manufacturers; the latter for realization, the proceeds to be remitted as per letter of advice. Of these two classes of goods some were in *Tambaci's* godowns, others had been sold, but no remittances made in respect thereof. The High Court held that the Appellants were *primâ facie*

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entitled to the possession of all the goods shipped by them to *Tambaci* on whatever account which were in *Tambaci's* godowns in *Calcutta* at the date of the suspension; that as regards the latter two classes of goods the Appellant's title must prevail; but that as regards the "lien account" goods their *primâ facie* title was displaced, and the Respondents were entitled to possession by virtue of a lien created in favour of the Respondents and enforceable against the Appellants. But this lien was not proved. The banian had none by rule of law or custom of trade. There was no agreement to that effect. The terms of employment were proved by a written agreement, dated the 11th of July, 1873, which was an ordinary banianship agreement, and, moreover, was silent as to advances to be made by the banian to the firm. Under it the custody of goods and their delivery to purchasers were intrusted to the banian, but until delivery the goods remained in *Tambaci's* godowns, the keys, no doubt (as is usual in such cases) being with the banian, whether he advances money or not, and the native servants being employed by him. With regard to any oral agreement as to lien on goods in the firm's godowns for advances made to the firm it was submitted that the result of the oral evidence, interpreted by the conduct of the parties, was that no such agreement was ever made. Further, it was found that the Respondent *Byjnauth* knew that *Tambaci's* business was largely a consignment business, that the "joint account" goods and the "pure consignment goods" belonged to other people, and that *Tambaci* could not create a lien on them in respect of advances made to himself. The further finding that in regard to the "lien account" goods there was no evidence of express notice to the banian that they belonged to the Appellants, and that therefore the Respondent's asserted lien was protected by sect. 178 of the *Indian Contract Act* was disputed. Those goods were never pledged within the meaning of that section. The pledge (if any) was invalid because the Respondent was not "acting in good faith" within the meaning of that section, or, at least, was acting under circumstances which raised a reasonable presumption that he was acting improperly. As regards the goods stopped *in transitu* by the Appellants it was submitted that the evidence did not prove that the Respondents had a lien

thereon. Even if they had as against *Tambaci*, it was not available against the consignors so as to render their stoppage *in transitu* invalid. The indorsement of the bills of lading of those goods to the Respondents relied on by them was not by way of pledge, and could not operate to defeat the Appellants' right to stop them. Even if such indorsement had been by way of pledge it was in respect of a past consideration, and not to secure specific advances made on the bills. Accordingly under sect. 103 of the *Indian Contract Act*, it was inoperative for the purpose claimed. [Reference was made to *Ex parte Banner* (1); *Cole* v. *North Western Bank* (2); *Evans* v. *Trueman* (3), a case in 1830 before the *Factors Act* of 1842; *Kaltenbach* v. *Lewis* (4); *Kemp* v. *Falk* (5); *Spalding* v. *Ruding* (6).]

Rigby, Q.C., and *Knox* (*R. S. Wright*, with them), for the Respondents, contended the judgment of the High Court was well founded in law and fact, and ought to be affirmed. The legal possession of the goods in the godowns was with the Respondents. The evidence proved that the servants of the Respondents slept within the compound in order to keep charge of the goods in the godowns. The keys were given to the banians with the intention of transferring possession. After the transfer of the keys, the goods remained under the exclusive custody and control of the banians. The exception was when they were pledged to the *Bank of Bengal*. When that occurred the mode of transferring possession to the bank was precisely the same as that by which possession was transferred to the banian. Under the agreement of June, 1873, as confirmed in 1875 and 1882, and acted on by the parties, the Respondents had within the meaning of sect. 171 of the *Indian Contract Act* (ix. of 1872) a lien on all the goods in question as a security for the general balance of their account. There was no evidence of any trust relating to the goods in favour of the consignors or any one. The respondents by their course of dealing with the firm of

(1) 2 Ch. D. 278, 289.
(2) Law Rep. 10 C. P. 354
(3) 1 Moo. & Rob. 10.
(4) 24 Ch. D. 54; 10 App. Cas. 617.
(5) 7 App. Cas. 573.
(6) 6 Beav. 376, 12 L. J. (Ch.) 503.

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Tambaci had become in effect its bankers, and had a bankers' lien under sect. 171. The evidence shewed that, and it was moreover consistent with the ordinary functions of a banian. Those functions may be varied by agreement, but ordinarily a banian is a native agent employed by his firm for the purpose of sales collecting funds or other transactions, which from his better information and greater familiarity with the market and the people he is more able than his employers to conduct with advantage. His functions usually are to guarantee the regular payment of debts due to the firm by the buyers in the bazaar, to guarantee the safe custody of the goods in the godowns of the firm, to engage clerks for the service of the firm and to guarantee their honesty. A banian accordingly often advances to the firm on the sale of goods on credit the amount for which the goods have been sold. Under the agreements proved or admitted in this case, all payments made by the firm were made by the banian. The firm after 1873 had no account with any *Calcutta* bank. Its cheques were directed to the Respondents' cash keeper. The course of business shewed that both parties contemplated a lien on the goods in favour of the banian and acted accordingly. And under sect. 178 of the *Indian Contract Act*, there was a valid pledge of the goods. Reference was made to sect. 146 of the *Indian Contract Act*, to the various *Factors Acts*—6 Geo. 4, the Act of 1842 and 15 & 16 Vict. c. 39; *Cole* v. *North Western Bank* (1). Banians in truth are factors such as that legislation refers to, and the course of dealing with factors prescribed by those Acts represents what is fairly applicable on grounds of natural justice to persons similarly situated. Reference was made to *Evans* v. *Trueman* (2); *Leuckhart* v. *Cooper* (3); the cases cited by the Appellant and *Rodgers* v. *Comptoir d'Escompte de Paris* (4); *Leask* v. *Scott* (5). Then as to the claim for account it was contended that the goods in question were duly sold and accounted for to the firm, and that the Respondents had under their agreement the right to recover from the firm's debtors sums paid by them to the firm as sureties for such debtors. Further there was no privity between the

(1) Law Rep. 10 C. P. 354.
(2) 1 Moo. & Rob. 10.
(3) 3 Bing. N. C. 99.
(4) Law Rep. 2 P. C. 393.
(5) 2 Q. B. D. 376.

Appellants and Respondents: see *Maspons y Hermano* v. *Mildred* (1); *Orr-Ewing* v. *Govind Chunder Sein* (2); *New Zealand and Australian Land Company* v. *Watson* (3).

Then as regards the right claimed to stop the goods on the jetties it was contended that that was stopped by the transfer of the bills of lading under English law relating to English contracts. But whether the right depended on English or Indian law the transit had ceased when the goods became at the disposal of *Tambaci's* firm. Sect. 99 of the *Indian Contract Act*, 1872, gave the consignors no right to stop *in transitu*, for first they were not sellers of the goods within the meaning of that section, and second they had drawn on *Tambaci's* firm for the price of the goods, and their bills had been accepted, and at the date of the stoppage of the goods the acceptances had not been dishonoured. The advances on and endorsement over of the bills of lading amounted to an assignment by way of pledge of the goods to secure an advance specifically made upon the bills of lading in good faith within sect. 103 of the *Indian Contract Act*. With regard to consideration for such assignment of the bills of lading it was contended that such consideration was to be found in the fact that all advances were made or agreed to be made after arrival of the particulars of shipment on terms that the bills of lading should be endorsed as security. The actual endorsement related back to the agreement to endorse, so as to form a present consideration. Reference was made to *Rodgers* v. *Comptoir d'Escompte de Paris* (4); *Chartered Bank of India* v. *Henderson* (5).

Asquith, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

These suits form part of a group of seven suits instituted for the purpose of deciding questions arising out of the failure of *Caralambus Tambaci*, who carried on business under the firm of *Paul Tambaci & Son*. The suits were disposed of by the High

(1) 9 Q. B. D. 530, S. C. 8 App. Cas. 874.
(2) Boul. 534.
(3) 7 Q. B. D. 374.
(4) Law Rep. 2 P. C. 393.
(5) Law Rep. 5 P. C. 501.

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Court of *Calcutta* simultaneously upon evidence and arguments common to the whole. The decrees have not been challenged in appeal except so far as they are adverse to the interests of Messrs. *Peacock, Mollison & Co.*, who are in effect the Appellants in both the suits now the subject of these appeals.

The facts of the case have been so fully, accurately, and luminously stated in the judgment of the High Court, and, as stated there, have been so entirely relied on by the counsel, and so repeatedly referred to during several days of argument, that their Lordships do not find it necessary to make any fresh preliminary statement, but will refer to the material facts as and when they are required to explain the conclusions arrived at.

The principal question in the High Court, and the only one which their Lordships propose to deal with in these appeals, is the question whether *Byjnauth*, or, as he is usually called, "the banian," was entitled to the lien which he claimed against merchandise in the godowns of *Tambaci*, and against other merchandise which at the time of *Tambaci's* suspension of payment was on board ship, consigned by *Peacock* to *Tambaci*, and which *Peacock* claimed the right to stop *in transitu*. The effect of the High Court decrees is to deny the banian's claim of lien over goods marked with certain devices of which the *P.* mark may be taken as an example, but to affirm this right over goods marked *P. T. & C.* The learned judges were of opinion that he had stipulated for a lien over the whole, but that as to all except the *P. T. & C.* goods he knew that they were consigned by *Peacock* under express agreements that the proceeds should be remitted to meet bills drawn against them; and therefore that *Tambaci* could not properly pledge those goods as security for the balance of a general current account.

The High Court rightly states that there is no rule of law giving a lien to a banian, neither is there any custom to that effect. If he claims one, he must prove it either by shewing some express agreement, written or verbal, that he shall have a lien, or some course of dealing from which it must be implied. The banian relies on both these methods of proof, but he does not allege that there was any written agreement.

The express agreement relied on being only verbal, it is im-

portant to see how the banian states it. His plaint was the first step in the litigation, and in it he states, in general terms, that up to the year 1882 he made advances to *Tambaci* on the security of a lien on the goods in his godowns. With respect to the year 1882, he states with more particularity, that he refused to make further advances without further security than the goods in the godowns afforded, and that he was assured by *Vassilopulo* (who was then managing the affairs of *Tambaci* in *Calcutta*) that more goods were coming out, and that in effect he made his advances thenceforward on the security of all the goods shipped from *England*, whether they had arrived or not.

In his examination on interrogatories the banian was asked whether he did not become *Tambaci's* banian under the agreement of the 11th of July, 1873, and whether that agreement had been rescinded or altered. His answer is to the effect that he was employed under that agreement, and that it was never expressly rescinded, but was modified in some respects. The most important modification was that, whereas the agreement provides that the banian shall deposit with *Tambaci* Rs.25,000 in government securities or cash by way of security against his defaults, it was "shortly after the execution" agreed, at the request of *Caralambus Tambaci*, that the banian should, instead of the deposit, advance him Rs.25,000 in cash, with interest at 12 per cent., and on the security of the goods in the godowns.

He then goes on to state that "very soon after the execution" of the agreement, *Caralambus Tambaci* proposed to him that he should advance funds to the firm from time to time upon the security of a lien and charge upon all goods for the time being in the godowns of the firm, and that advances were made on that footing.

In the beginning of the year 1875—the banian says—he found that *Tambaci* was enlarging his business, and required more advances, and he asked for a fresh written agreement giving him security, but *Caralambus Tambaci* put him off by saying that the word of a gentleman was sufficient, and that he need not be afraid, "as all the goods in the godowns would remain in my possession as a pledge." At the same time, he says, it was agreed, amongst other things, that his advances should carry

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interest at the rate of 12 per cent. per annum. As regards the transactions of the year 1882 he affirms the allegations made in his plaint.

The plaint was filed in September, 1882; the banian was examined on interrogatories in June, 1883; and in August, 1883, *Caralambus Tambaci* was orally examined in *England*, and cross-examined at great length by the banian's counsel. He denied that there was ever any agreement that the banian should have a lien on any goods for his advances. At the trial of the cause in May, 1884, the banian was orally examined. He had then the advantage of knowing *Tambaci's* oral deposition, whereas *Tambaci* knew only what the banian had said upon interrogatory, and, being in *England*, could not be recalled to speak to any new matter.

In point of fact some very important new matter is introduced by the banian at the trial. His account now is as follows: "One day" (which may be taken as being the 9th of June, 1873, though it may be a day or two earlier, but the exact day is not material) "he was introduced to *Tambaci* at the office of Mr. *Sassoon*, and *Tambaci* asked him to be his banian in the same way in which he was acting for *Sassoon*. They arranged to go more fully into the matter at *Tambaci's* house, and *Tambaci* went away. *Sassoon* said nothing on that occasion. One day," probably the next day, or (say) the 10th of June, the banian went to *Tambaci's* house. "I asked him, 'How do you wish the business to be done?' He said he would give me a commission of 1½ per cent., and interest at 12 per cent. per annum, 'and I will take advances from you on my goods.' He further said this, he was carrying on business on a very limited scale, and only required small advances, but hereafter he intended to extend his business, and then he would require larger advances. Then I said to the sahib, 'State to me the nature of the business more particularly.'" Then it was arranged that the banian should have the key of the godowns; that his men should be in charge of the godowns; that the chitties for goods delivered should be made out in his name, "in respect of the advances which I shall have made on these goods;" that the godown sirkar was to be his man, and the durwan, and the cash babu. The two parties

then visited the godowns together, and the banian agreed to put a man in charge. The next day (say the 11th of June) they met again at *Sassoon's* office, and "had all the conversation about the terms over again; commission, chitty, interest, advances, mode of delivery, and everything over again." This took place in *Sassoon's* presence, and he joined in the discussion, and said that those were the terms on which the banian was doing business with him. On the 12th of June he paid the Rs.25,000 to the Agra Bank to redeem goods in pledge; and it was probably on the 11th that he began his business as banian.

Sassoon speaks to the two meetings at his office, and he confirms the banian as to the nature of the agreement; but he says that the terms of it were all settled at the first meeting through his intervention, both because *Tambaci* wished to engage on the same terms on which *Sassoon* did business with the banian, and because he acted as interpreter when necessary. At the second meeting he says only that he learned they had agreed with each other, and commenced the business.

When weighing the conflicting lines of evidence, the High Court addresses itself to the question of antecedent probability. The learned Judges think it improbable that a man like the banian would give such large credit without security to a firm situated as *Tambaci's* was in 1873. But it must be borne in mind that the business was very greatly enlarged after the banian's employment, and wholly by means of his advances; that besides his commission he got interest at 12 per cent., an amount of 4½ above the average bank-rate upon pledges; and that this charge of interest so completely absorbed the assets of the business that in January, 1882, *Vassilopulo* calculates that the firm is insolvent by exactly the amount it has paid for interest during 1880 and 1881. It may be true that a man supplying money as the banian did, would, though he looked to profit on sales, expect a higher interest than the bank which made specific advances on specific goods, but hardly so much higher. Their Lordships do not see the *à priori* improbability of the opposite theory, that the banian was glad to carry on a great trade with the credit and connection of *Tambaci*, of which the whole proceeds, except so much as was necessary for the

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actual living of the *Tambacis*, would come into his pocket in the shape of interest or commission. The great inflation of the business, which proved after a time, when markets were adverse, to be ruinous, could not have been effected without his aid, given long after he knew that *Tambaci* had no capital of his own. That he should also be a secured creditor seems a somewhat exaggerated amount of advantage to stipulate for.

But there are other considerations affecting the *à priori* probability of a transaction. On *Tambaci's* part it was, as the banian states it, a dishonest one. In *England* he was buying goods on express agreements that the money got for them in *Calcutta* should be appropriated to meet bills drawn for their price, while he was making such arrangements in *Calcutta* that at the moment of their arrival there they would be subject to a prior lien for the whole amount due on account current with the baniar. Indeed, the banian claims by virtue of the fresh agreement in 1875 to have a claim against the goods while yet in transit. It can hardly be thought *à priori* probable that *Tambaci* would make such an agreement.

No doubt many things that *Tambaci* knew were concealed from the banian. But the banian alleges one entire agreement, extending to the whole of the goods consigned to *Tambaci* in *Calcutta*, and operating continuously (with the extension in 1875) to the close of the transactions. Now it is proved beyond doubt, and the High Court have found, that as to portions of the goods (*e.g.*, those marked $^{P}_{C}{}^{M}$) the banian had notice of the interest of the consignors. Yet he went on, maintaining that his agreement gave him a prior lien on those goods. Moreover, he was warned in 1875 by a friend that "commission goods" stood in a different position from others, and was advised to make inquiries on the subject. He says he had a conversation a few days after with the sahib (*Tambaci*), but it does not appear that he ever made, or, if he made, that he ever pursued, any serious inquiry on the subject. He held on his course just the same. The agreement, then, which he alleges is an agreement for a general lien on all goods coming to *Calcutta* on *Tambaci's* account, whatever might be the terms on which the vendors had shipped them. It is not *à priori* probable that any experienced man of business,

such as the banian was even as early as 1873, should rely on such an agreement as that. It seems to their Lordships that the agreement, as stated by the banian, was, on his own side, a hazardous one, and on *Tambaci's* side dishonourable, both considerations being against its antecedent probability.

The direct oral evidence to support the original agreement alleged by the banian is confined to the banian himself and *Sassoon*. The High Court attach great importance to *Sassoon's* evidence. Nobody has impeached *Sassoon's* veracity. But the weight of his evidence to support the banian depends also upon its accuracy, upon its accordance with the banian's own account, and partly upon the opportunity given for meeting it. The conferences at *Sassoon's* office and at *Tambaci's* house in June, 1873, are the corner-stone of the banian's case as presented by his oral evidence. It is most important that there should be no doubt as to their tenor. There is no doubt that in some way, and it may have been by conversation in *Sassoon's* office, arrangements were made that the banian should take charge of merchandise, should incur expenses in employing a staff, should effect sales on commission, should receive the money, and should bring it into account, receiving discount at the rate of 12 per cent. on it if paid before it was due, and paying interest at 12 per cent. if retained after it was due. When a discussion is carried on between three persons, sometimes in English, sometimes in Hindustani, and with one of them acting occasionally as interpreter between the other two (which is *Sassoon's* account of the first conference), it must be very easy indeed to confuse between a conversation and an agreement, and between such an arrangement as *Tambaci* alleges and as is embodied in the agreement of the 11th of July, and an arrangement to advance money against the security of the goods. *Sassoon* tells us that "somebody said, if money is to be advanced, it must be against the security of the goods." The somebody, he thinks, was the banian, and *Tambaci* agreed. This was evidently, according to *Sassoon's* recollection, the first introduction of this important matter between the parties, and he himself took an active part in making the bargain. But the banian's memory is materially different. Nothing, according to him, was done at the first meeting except

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the introduction of himself to *Tambaci*, and *Sassoon* said nothing. All the details were settled the next day in the absence of *Sassoon* at *Tambaci's* house. They were "made pucka" at the second meeting in *Sassoon's* office in Hindustani, though *Sassoon* says only that he then learned that the parties had agreed and commenced business. Now, when such differences are found between the parties in their recollections of those occurrences, which are the most striking in their nature and the most likely to endure in the memory, they must materially impair the value of statements as to other parts of the conferences which are less likely to endure in the memory, viz., the exact expressions used, whether in Hindustani or in English, concerning the banian's advances and his position with respect to the merchandise he was to keep and to sell. It may be that something was said about advances, but it would be dangerous to hold an agreement proved upon such evidence, even if there were nothing but *Tambaci's* previous denial to bring it into doubt.

Then as to the possibility of meeting this evidence, which in effect was sprung upon the banian's opponents at the trial. *Tambaci*, the only other person present on these occasions, could not be recalled, which, as the High Court says, was unfortunate; and the Appellants are entitled on that ground at least to have the evidence very critically examined. But the objection goes somewhat deeper. Why were not these extremely important conferences mentioned earlier? The first person who introduced the name of *Sassoon* is *Tambaci* himself. When under cross-examination he stated that *Sassoon* introduced him to the banian. That would have been the time to press him as to his recollection of the conferences in June, 1873. But though several questions were put to him about *Sassoon's* introduction, nothing was asked about the conferences. On the contrary, it is suggested that it was not *Sassoon* at all, but *Demetriadi*, who introduced the banian. His legal advisers then could not have been instructed as to these important conferences which gave birth and shape to the agreement now relied on. Their Lordships find it very hard to believe that, if the banian had really relied on the making of the agreement he now alleges, he would not have put it forward at the earliest moment, whereas he failed to do so when invited

by the interrogatories to say under what agreement he carried on business, and failed again, when in *Tambaci's* examination it would have been proper to lay a ground for its introduction. It is not till the trial that he brings forward the conferences which are the origin of his agreement and its strongest direct evidence.

As regards the evidence of the banian, the High Court, while thinking him capable of adding a fringe of fictitious evidence to his case, and in fact disbelieving him in some instances, were favourably impressed by his demeanour, and think him not untruthful in the main; and they express belief in his main statement, though not till after satisfying themselves that a number of incidents in the course of the business tell in its favour. Their Lordships accept the view taken of the banian's character, but they cannot help taking his evidence as labouring under two great difficulties.

One has been already mentioned in commenting on *Sassoon's* evidence. The other is that, at least down to the year 1880, there is no written document produced which is so much as alleged to confirm him. On the 11th of July, 1873, just a month after the conferences at which the terms of his employment were settled, the written agreement was executed, and it is wholly silent about advances or security, except a security to be given by him to *Tambaci*. It is a most extraordinary thing that the banian, who thought it necessary that the terms which he had settled with *Tambaci* should be repeated all over again, and "made pucka" in Hindostanee before *Sassoon* (such is his version of the affair), should not think it necessary to see that they were embodied in the formal written agreement. His mode of meeting this difficulty is even more extraordinary. He says that the written agreement was never read over to him, and that he did not, even up to the time of his examination, know what it contained. "I was under the belief when I signed it that it contained the terms arranged for the pledge of goods advanced on." Their Lordships find it impossible to believe this statement. He did not put it forward when examined on interrogatories. It was not suggested in *Tambaci's* cross-examination. The agreement was prepared, and its execution witnessed,

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by a solicitor of the highest standing, to whose office the banian is said by *Tambaci* to have gone several times about this matter. That solicitor would hardly have permitted a party ignorant of English to execute the agreement without satisfying himself that he understood it. And the banian's then partner in this one business, *Mohendro Nath*, who knew English well, and who appears to have been taken into the business on account of that knowledge, and who is stated to have accompanied the banian on several occasions to the solicitor's office while the draft was in preparation, and who executed the agreement, is not called to say anything about it.

Their Lordships hold that the oral evidence wholly fails to establish the agreement for lien on which the banian relies in the year 1873. As for the asserted modification or new agreement in 1875, there seems to be no evidence of it but that of the banian himself, given at the trial, and quite contrary to the story told in his answers to interrogatories; unless the statement of his gomashta, *Nowrung*, can be considered a corroboration. The High Court have justly disbelieved it. But the learned Judges consider that there was an agreement for a lien in 1873 on the goods in the godowns, and that it was extended to goods in transit at some subsequent date, relying on inferences drawn from a variety of circumstances which their Lordships will proceed to consider.

The first is, that the banian had the keys of the godown in which the goods were stored, and appointed men to take charge of them. That is no more than was necessary for the performance of his duty to take and keep the goods and to make sales and to deliver to the buyers. His predecessor in the post, *Nolit Mohun*, who made no advances, had the same kind of custody. When the banian tries to make out that his custody was of a more exclusive character, and that the durwans were all appointed by him and not by *Tambaci*, the evidence is against him. The High Court disbelieve him, and treat this story as one of the instances in which he adds a fringe of fiction to his real case. It is observable that when the *Bank of Bengal* took goods in pledge they were careful to have the exclusive possession of them, changing the locks and appointing their own durwans.

Having regard to this difference, and to the fact that the banian thought it desirable to strengthen his case by evidence which was proved to be untrue, their Lordships think that this incident of the course of business bears against the banian's contention.

The next point is, that the bazar chitties were made out to the banian, whereas in *Nolit Mohun's* time they were made out to *Tambaci*. That change seems a very immaterial circumstance, if in itself the new practice was more convenient. It certainly seems more convenient that the banian, who after a contract of sale had been made, was debited in *Tambaci's* books with the price, and was held responsible for it, and who transacted with the buyers from first to last, should also (even independently of the fact that the firm was usually in debt to him) be the person to whom the buyers should give their notes for payment. Their Lordships think that this incident bears neither one way nor the other on the point in controversy.

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The next point is, that policies of insurance of the merchandise against fire were regularly effected by the banian in the name of *Tambaci*, and then indorsed by him and handed to the banian. The practice is denied by *Tambaci*, but is proved to have existed during the whole period of *Vassilopulo's* management, and must be taken to have been in existence when he assumed the management in April, 1878. The High Court consider that the policies were endorsed by way of completing the banian's security. Their Lordships agree that this incident makes more for the banian's theory than for the opposite one, but it does not make very strongly. It is the common case that, at all events in the later years of the business, the firm was always heavily indebted to the banian, and that he looked for payment to the sales of goods. If then sales should be prevented by fire, it would be, as between *Tambaci* and the banian, right that the latter should have the substitute for the price, and convenient that he should have in his hands every facility for getting it. It may be observed that no fire ever occurred, so that no occasion has arisen for dispute as to the property in the policies or in the money secured by them.

An important feature in the course of business is the treatment

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of the bills of lading. At the trial the banian asserted that they were endorsed to him directly upon their arrival in *Calcutta*; and his gomashta *Nowrung* backed his assertion. If that had been the case, it would have given support to the banian's contention that he was intended to hold a security upon the coming merchandise. If there was an agreement to that effect, it certainly would be of importance to him that he should have the title assigned to him and should possess the documents of title at the earliest possible moment; but the banian's assertion on this point appears to be part of the fringe of fiction. The facts are the other way, and are so found by the High Court. The object of endorsing over the bills of lading was that the endorsee might obtain delivery of the goods from the ship, and they were never endorsed till the arrival of the ship, which was generally a week or ten days, and sometimes longer, after the arrival of the bills. In his plaint, which was framed at the very beginning of the controversy and before the importance of these details had been observed, the banian states what happened in the case of one ship, the *Knight of St. Patrick*. "On the arrival of the said vessel, ... the said *Vassilopulo* . . . . endorsed and delivered to the Plaintiffs the bills of lading and the said goods . . . . in order to enable the Plaintiffs to obtain delivery of the same, and to hold the same subject to their lien, &c." This is a plain account of the practice of the firm both with *Logothetis*, when he acted as carrier from the ship to the godown, and afterwards with the banian when he became carrier; only with the addition of the then controverted matter of lien. The opinion of the High Court is that the practice as to the bills of lading, standing by itself, proves nothing either way. To their Lordships it appears to bear against the banian's theory, if standing alone.

But it does not stand quite alone. For a considerable period, dating back at least to the year 1877, particulars of shipments of merchandise, which were sent out from *Manchester* as early as possible, were communicated by *Tambaci* to the banian. There is the inevitable dispute about the meaning of such a practice. One side says it was because the banian was to advance against those shipments, and on the security of the goods shipped; the

other side, that it was to facilitate dealings between the banian and the customers at the earliest possible time. Their Lordships are not now dealing with the events which happened at the end of 1881 and during 1882, about which there are some peculiar features, but with the practice which prevailed for some years previously. If the banian's theory of the communication of particulars were the true one, it is almost impossible to conceive that he would not (as he now alleges he did) get the most important document of all transferred to him as soon as it arrived in *Calcutta*. But he did not. And the two parts of this practice throw a reflex light on each other. The retention of the bills by *Tambaci* goes to shew that the communication of the particulars was for the mercantile object which he alleges. And the communication of the particulars lends more significance to the fact that the documents of title were retained till the moment when it became necessary to transfer them for the purpose of obtaining delivery of the goods.

It will be seen that, in their Lordships' opinion, the incidents of business hitherto enumerated tell much more against the banian's case than in its favour. But it has been strongly urged at the Bar that during the latter period of his employment the banian did, with the knowledge of *Vassilopulo*, make advances in contemplation of specific quantities of merchandise either arrived in *Calcutta* or notified to arrive; and that it must be taken to have been the contract between the parties, at least at that time, that the goods so taken into consideration were to be held in pledge for advances made immediately afterwards. It is not indeed asserted that in any instance there was a specific sum of money advanced on the security of a specified quantity of goods. The lien claimed at this period is still a lien for the general balance of account. But the fact that the banian calculated the amount of goods belonging to *Tambaci* is said to shew that he must have advanced on the security of them.

A number of letters have been put in evidence to sustain this contention. Some were written by *Tambaci* to the banian, and these contain nothing to the purpose. Others passsed between *Vassilopulo* and *Tambaci* during the latter part of 1881 and in 1882, and in them *Vassilopulo* enlarges on the fears and irritation

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of the banian, and on the necessity of so encouraging him by sales of stock or reduction of debt on the Indian side, and by purchases of new stock on the English side, that he may continue to supply the funds necessary for the existence of the firm. The contention on the banian's part is that, though he was no party to this correspondence, it faithfully reflects the interviews between himself and *Vassilopulo*, that *Vassilopulo's* expressions are inconsistent with the idea that the banian was not advancing on the security of the merchandise, that *Tambaci* approved what *Vassilopulo* was saying and doing, and that it was not open to him afterwards to say that there was no agreement for such security.

The earliest document relied on, the document before referred to as the only one produced to confirm the banian's case, is of earlier date than this correspondence. It is a list of goods in the godowns, dated the 2nd of June, 1880, made out by *Vassilopulo*, and with some calculations written on it by the banian. He sets down the value of the goods, the amount of his advances, and his receipts from sales for some time past, and concludes that he may advance more. That is all. The High Court thinks it some corroboration of the banian's case. But that depends upon the view taken of the then subsisting relations of the parties. It appears that *Vassilopulo* had asked the banian for money at a time when no goods had arrived for two or three months. It is the common case that the banian got his profits by means of the constant influx of goods from *England* and their sale in *Calcutta*. It must have been essential to him at all times after the large advances began that he should be well acquainted with the magnitude of the business. And if he had reason to think that its life blood was being dried up by the stoppage of supplies from *England*, it was natural for him to calculate the amount available for sale in *Calcutta* before making further advances. The ordinary course of the business would shortly bring the whole of the price into the banian's hands. There is nothing to shew that at this time he was looking beyond the ordinary course of business. The incident now under consideration is consistent with the theory he now sets up, but it is equally consistent with the contrary theory.

The banian does not assert that there was any alteration in the terms of his employment, either at this time or later on. His account of what passed in 1882, is as follows :—

" In 1882, I had the arrangements also with Mr. *Vassilopulo*. In this way there was an arrangement before it was made more pucca in 1882, as regards the goods in transit. The arrangement was the same, only, before 1882, I used to advance as much money as he wanted; subsequent to 1882, I advanced only to the extent of the goods I received. The arrangement as to the goods in transit was made in 1875. There was no alteration or addition to it in 1882."

Strictly construed, this statement would mean that before 1882, money was advanced by the banian just as asked for, and without any reference to amounts of goods, which would be destructive of his case. Such cannot be his meaning; it is impossible to think that there ever was a time when he had not regard to the volume of the business; and he probably means only that during 1882 he made advances with a more careful eye to the quantities of goods available for sale. But that increase of caution would not give him a lien. The course of the business continued as before.

It is to be noticed that *Vassilopulo* himself believed that the banian had a lien on all the goods purchased. His views are succinctly stated in his letter of the 7th of November, 1888, where he combats *Caralambus Tambaci's* assertion that the banian had no such lien :—

" You deny that the goods are pledged to the banian, and as I hear, will send an affidavit to that effect. But have I said or do I say anything to the contrary? On the contrary, I maintain that there is no agreement of the sort. What I do not deny though, and what I never shall nor can I deny, is that the banian always held the keys of the godowns, and this circumstance, and the manner in which the banian made the advances since January, 1882, entitle the banian to a lien. And then just notice how many other circumstances have turned up in favour of the banian. Nobody can take from him those goods on which he paid the drafts or which he released from the *Bank of Bengal*."

The same views are insisted on in his evidence. He and the

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banian are at one in stating that there was no new agreement made in his time. He is indeed drawing a conclusion of law, on which his opinion is of no value. He infers a lien from the practice from which it is not to be inferred. And he does not distinguish between the various classes of goods to which it may apply, viz., the goods which were specifically pledged to the bank and redeemed, and the goods, the drafts against which had been paid, and the goods whose proceeds ought by *Tambaci's* express agreement to be appropriated to pay the shippers the price still due to them.

The correspondence between *Vassilopulo* and *Tambaci* must be read with these conflicting views of the two parties clearly kept before the mind, and with the recollection that the conflict had not until late in 1882, been brought into relief, and that the question is whether *Tambaci* must have understood *Vassilopulo's* expressions as meaning that, beyond his interest in obtaining merchandise and selling it, the banian held a legal security upon it. In two or three passages *Vassilopulo* speaks of "cover" to the banian by purchases and by goods. But he also speaks of "covering" him by sales, which was *Tambaci's* view of the legitimate way of reimbursing him. He says in one passage that the banian and the bank, in case of insolvency, would "take all our stock;" but in the next sentence he says that the creditors in *England* would "take" the property there, though there was no pledge of that.

Again, he writes of a discussion with the banian, in which he sets forth the great profit which the latter is making, about a lac a year by interest, besides other profit; and he sets their debt to him against the "value of the goods in your hands." And the conversation proceeds thus:—

"After I had pointed out to him the increase of our business on the one hand, and the profits he makes without any danger on the other, I said to him point blank,—'Baboo, you must allow us more accommodation in proportion to the business we are doing, and which is increasing daily. At least 10 lacs, if you have confidence in our business, our character and honesty, and in the management of the business. If you have no confidence, or if you are not prepared to supply us with the requisite accom-

modation, tell me plainly, because I consider it my duty to place everything before Mr. *Tambaci*, so that he may do what is necessary in connection with the increase of our business. If we are able to do a large business, let us do it, if not, we must curtail it; in any case though, I, as manager here, must know, so as to arrange my transactions accordingly.'"

After which, he says the banian assented to give further help when his other engagements permitted him to do so. That conversation has been very much pressed at the Bar as being impossible to reconcile with the conclusion that the banian had no legal security against the goods. To their Lordships it appears to be consistent with the banian's contention, but to lead more naturally to the inference that the parties to it were not thinking at all of lien or any other legal question, but of the banian's interest in keeping up and extending a business from which he was deriving great profit, without incurring the risk of a partner, and with practical security, as *Vassilopulo* contended, so long as his advances and the volume of the business answered to one another. As for the mere expression "goods in your hands," *i.e.*, the banian's hands, *Vassilopulo* frequently speaks of the same goods, or of goods in the same position, as goods in "our" hands, "our" stock, and so forth.

Their Lordships think that too much stress has been laid on those letters passing between *Vassilopulo* and his principal, but as they have been so much discussed on both sides, their Lordships have examined them, with the result of finding that there are no expressions in them which *Tambaci*, or, indeed, any other person knowing the relations of the parties, might not naturally read without suspecting that the banian was setting up a claim to legal security upon the goods, and that no conversation with him is related which is not referable to his commercial advantages and practical security in the increase of the business.

We have evidence of the usual course of business being followed down to July, 1882, in the case of the ship *Myra*, which has been relied on at the Bar as shewing that the security of the merchandise was a condition of the banian's advances. The particulars of shipments by the *Myra* arrived on the 6th of July, and *Vassilopulo* immediately transmitted a copy to the banian's

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gomashta, with a written request indorsed upon it that he wanted Rs.18,000, and that sum was paid to him. It was the only occasion on which a request for money was made in that way. Now, if the advance was made on the security of the goods, we should expect that the banian would be very careful to perfect his legal title by getting the bills of lading at the earliest possible moment. But though he asserts that he did procure them on their arrival, he could not prove a single instance in which he had done so. That is strong to shew that even in the case where a special request for money was made on shewing a special shipment, the consideration for the advance was, not a pledge of the goods, but the profit to be made by their sale, and the reimbursement of general debt by their price when sold, according to the ordinary course of the business.

The upshot of all this examination is that there never were any such agreements for security as the banian alleges in 1873 and 1875, and that the transactions of 1881 and 1882, though they shew more caution on the banian's part in regulating his advances according to the volume of business, yet left the prior arrangements untouched, and that they remained untouched until *Tambaci's* insolvency.

This view renders it unnecessary to examine the question of notice, or whether, in the language of the *Contract Act*, the circumstances raised a presumption that the pawnor was acting improperly. It is also unnecessary to consider whether Messrs. *Peacock* had a right to stop *in transitu*, because the banian, having no lien, had no interest entitling him to dispute their claim to effect a stoppage.

As to the goods sold and brought into account between *Tambaci* and the banian, their Lordships agree with the High Court for the reasons given by the learned Judges. It has been argued at the Bar that the sales effected in September, 1882, which undoubtedly were large and rapid, were a wrongful act as between *Tambaci* and the banian, who, it is said, falsely represented *Tambaci's* wishes to *Vassilopulo*, and thereby induced him to effect the sales. Without stopping to consider whether, if such a case were proved, it would give such a right to recover the money as Messrs. *Peacock* claim, their Lordships hold that the evidence does not

disclose such a case. They are much more disposed to think that during his visits to *Cawnpore*, *Tambaci* was behaving deceitfully towards the banian, and leading him to suppose that large sales would be effected, and his debt reduced thereby. Nobody attributes misconduct to *Vassilopulo*. There is no suggestion that the sales were effected at unfair prices. The sales, though negotiated by the banian and strongly pressed for by him, were the acts of *Vassilopulo* as manager of the firm, and were in accordance with the purpose for which the goods were consigned. As their proceeds have been duly brought into account between the firm and the banian, the principals of the firm cannot disturb that account, except on the ground of bad faith.

It remains to consider how their Lordships' view affects the decrees made below in the two suits.

In *Byjnauth* v. *Graham*, it was declared that the banian (the substantial Plaintiff) is entitled to one bale out of eight, and to fifty-five others marked *P. T. & C.*; and Messrs. *Peacock* (the substantial Defendants) are entitled to twenty-four bales with the *P.* mark. The banian is ordered to pay Messrs. *Peacock* the sum of Rs.6608 14*a.*, being the net proceeds of sale of the twenty-four bales, and their costs of a commission to examine *Vassilopulo* in *Calcutta*. Messrs. *Peacock* are ordered to pay to the banian his costs of suit, and one-fifth of the costs of the commissions to examine witnesses in *England*. It appears that the one bale was admitted to belong to the banian. *Vassilopulo's* examination was asked for by the banian and turned out to be useless. It is not clear why Messrs. *Peacock* are ordered to pay the whole costs of a suit in which they succeeded to a substantial extent; but it is probably because in the other suit, where the victory and defeat were also divided, the banian is ordered to pay costs. It is stated at the Bar that the method of dealing with costs has proved injurious to Messrs. *Peacock*.

The banian has now failed in this suit entirely, except as to the one bale to which his title is not disputed. Their Lordships have to make the decree such as in their judgment the High Court should have made it at the trial. The proper course will be, first, to affirm the decree so far as regards the one bale awarded to the banian, and the net sale proceeds of the twenty-four bales

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awarded to Messrs. *Peacock*, and so far as it directs payment of Rs.6608 14*a*. with interest to Messrs. *Peacock*, and so far as it directs payment of the costs of the commission to examine *Vasilopulo* with interest, and provides for the scale of taxation; secondly, to discharge the rest of the decree; thirdly, in lieu thereof, to declare that the banian had not at the institution of the suit any right or interest in the fifty-five bales and the sale proceeds thereof awarded him; to dismiss the suit so far as regards those bales; to direct him to pay to Messrs. *Peacock* their price, if sold, with interest at 6 per cent. from the time of sale, or otherwise their value, with interest at 6 per cent. from the institution of the suit, and also to pay them the costs of suit and one-fifth of the costs of the English commissions. Messrs. *Peacock* must also be repaid the costs paid by them in pursuance of the decree.

In *Peacock* v. *Byjnauth*, Messrs. *Peacock* were ordered to pay the banian's costs occasioned by their having instituted two suits instead of one. The suit was dismissed so far as it concerned the goods sold and accounted for. It was declared that the banian was entitled to the bales marked *P. T. & C.* It was declared that Messrs. *Peacock* were entitled to 104 bales marked $^{P.T.}_{C.}$ (which is clearly a mistake for $^{P.M.}_{C.}$), and to fifty-two bales marked $^{P.T.}_{C.}$, and the banian was ordered to pay them Rs.33,619 18*a*. 9*p*., being the sale price of so many of those bales as had not been delivered to them. And the banian was ordered to pay to Messrs. *Peacock* their costs of suit, except as aforesaid, and one-fifth of the English commissions.

The proper course will be, first, to affirm the decree so far as it directs Messrs. *Peacock* to pay the costs occasioned by bringing two suits, and provides for the scale of taxation, and so far as it relates to goods sold and accounted for, and so far as it relates to the bales marked $^{P.M.}_{C.}$ and $^{P.T.}_{C.}$; secondly, to discharge the rest of the decree; and, thirdly, in lieu thereof, to declare that out of the bales marked *P. T. & C.* and mentioned in the plaint Messrs. *Peacock* are entitled to be paid the amount of the bills drawn by them against such bales, with interest thereon at 6 per cent. from the institution of the suit; to direct accounts, if necessary, for the purpose of ascertaining the amounts due to Messrs. *Peacock*,

and the amount of the value or price of the bales, with interest thereon from the date of suit or of sale, as the case may be; to direct the banian to pay the amount found due on the bills out of the amount of value or price, so far as the same will extend; and to declare that each party ought to bear his own costs of suit, and to be charged with one-half of one-fifth of the cost of the English commissions. The banian must also be repaid the costs paid by him in pursuance of the decree.

As in these appeals each party has succeeded and each failed on a substantial issue, their Lordships award no costs, except that, under the circumstance of the extreme bulkiness of the record, they direct the Respondents to pay the Appellants one moiety of the costs of it.

Solicitors for the Appellants: *Phelps, Sidgwick & Biddle.*
Solicitors for the Respondents: *Sanderson, Holland & Adkin.*

LALL CHAND, AND OTHERS . . . PLAINTIFFS;

AND

THE AGRA BANK, LIMITED . . . DEFENDANTS.

J. C.*
1891
April 22;
June 13.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Banker and Customer—Payment of Cheque—Evidence.

Case in which it was held on the evidence that the Respondent bank had, on the presentation by the Appellants' servant of a cheque drawn upon it in favour of the Appellants, failed to pay the same in such manner as to be discharged of its obligation.

APPEAL from a decree of the High Court (August 30, 1889), reversing a decree of *Norris*, J. (March 3, 1889).

The facts of the case are set out in the judgment of their Lordships. The question decided was one of fact on which there had been conflicting decisions in the Courts below.

Norris, J., found that the bank had not paid the amount of the cheque in question to *Sewlall.*

* *Present:*—LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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In appeal the Chief Justice was of opinion that the case of the Respondent bank was a simple straightforward case, and one which it was very difficult to say could have been made up, and why made up, and which, if made up, must have been made up in "pursuance of a conspiracy to steal this money." He was also of opinion that "these notes, which are very large notes, have been unable to be traced," and that that indicated that they had "fallen into the hands of an experienced thief who knew how to put them into circulation, so that to convict the officers of the bank is to convict them not only of a conspiracy with the man who stole the money, but of a conspiracy carried out in such a way that it would appear as if they were well acquainted with this particular form of theft."

He was further of opinion that the story of *Sewlall* as to the person with whom he spoke in the bank was untrue, and was put forward by him for a particular purpose.

And he proceeded as follows: "He had made up his mind what story he was going to tell. He knew perfectly well what would be the case made against him. He knew the character of the persons who would be called against him. He knew that they would be the trusted officers of the bank. He knew that he was a Durwan in *Calcutta*, who had been in the service of the Plaintiffs for about a year and a half, and of course his character, quâ character, could be nothing when placed in the scale against the officers of the bank, and so he says that the person with whom I had the conversations, and the person whom I intend to charge with this theft, is a person I cannot find. It is clear that his object in stating that is, that no individual should be confronted with him, and that he should be in a position to say, if he should ever be asked, is that the man who paid you the money? No, he is not the man; and therefore he invents a person for that purpose. It is clear to my mind that no such person existed at all. For these reasons it seems to me that the Plaintiffs in this case have not established their title to this piece of paper, and that if this is an action for conversion of the note, the Defendants would have been entitled to a verdict. Under these circumstances I think that the conclusion of fact at which the learned Judge in the Court below has arrived in this

case is wrong, and that his judgment must be reversed, and a decree entered for the Defendants with costs."

Pigot, J., while concurring with the Chief Justice, expressed his opinion that the Appellants' case, as it stood, involved a deliberate misappropriation of the money by the bank's servants, and a conspiracy to conceal that misappropriation by perjury, that *Sewlall's* evidence was that he was in the bank the whole time, and remained there under such circumstances that it would have been practically impossible for the money, if it was paid, to be paid to anybody but himself, and that the alternative was "have these bank officers, about whom something is known, or have some of them appropriated this money, or has *Sewlall* made a mis-statement when he says that he was not paid?"

He was further of opinion, that to decline to give effect to *Sewlall's* evidence, was not to convict him of appropriating the money, as he might have been robbed of it after receiving payment, and might have desired to avoid the consequences of this misfortune by a desperate attempt at persuading the bank of a mistake as to the payment of the cheque. But that if *Sewlall's* story was accepted, some of the bank officers must have appropriated the money, the person who did so probably being "the absent poddar seen or invented by *Sewlall*."

Sir *C. Russell*, Q.C., and *Branson*, for the Appellants.

Cowie, Q.C., and *Bremner*, for the Respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal, one of fact only, is whether a cheque drawn by a firm of *MacNeill & Co.* upon the respondent bank, payable to the Appellants or their order, for Rs.15,000, was paid to the servant of the Appellants. The cheque was received by the Appellants on the 14th of August, 1888, and on the following day they endorsed it in blank, and delivered it to their servant *Sewlall*, who presented it at the bank for payment. The Respondents, in their written statement, said that the cheque was presented for payment, and the amount thereof was paid to

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Sewlall, but, in the judgment of the learned Judge of the High Court at *Calcutta* who tried the case, it is said that, after the Advocate-General had opened the Plaintiffs' case, Mr. *Phillips*, the Defendants' counsel, applied for leave to amend the written statement by the addition of a paragraph which would enable him to raise the defence that if, as a matter of fact, the bank did not pay *Sewlall*, but some other person who was not a servant or agent of the Plaintiffs, but who represented himself to be so, such payment was made in consequence of the negligence and default of *Sewlall*, and without any negligence or default of the bank, and that the bank was discharged by such payment. The amendment was opposed by the Advocate-General, but was allowed. No evidence was given by the Defendants in support of this view of the case, but it may not be unimportant that this application was made. The principal witness for the Plaintiffs was *Sewlall*, who said that he took the cheque to the bank and shewed it to a baboo (pointing to one in court), who told him to sign it and make it over to the munshi; that he signed it and handed it to the munshi, who wrote something on it in English and handed it back to the same baboo—the reason for this was that the cheque bore endorsements in Nagri which the munshi could, but the baboo could not read—that about a quarter of an hour afterwards the pass baboo gave the cheque back to him, and then he gave it to the cashier baboo. He then said, "I handed the cheque to the cashier baboo. He asked me, 'In what shape do you want it?' I said, '2000 in small notes, and 13,000 in thirteen notes.' After that the cashier said to me, 'Go to the poddar baboo. The cashier did not give me back the cheque. He kept it. On going to the poddar, I said to him, 'Pay me 15,000.' I went to the poddar baboo immediately on leaving the cashier. The poddar baboo said, 'Be seated, you will get it half an hour afterwards.' I took my seat on a stool or bench. I sat there for about half an hour. I then asked the poddar baboo for payment, and he said, 'The numbers have not come yet.' I then commenced pacing up and down there in front of the counter. I did that for a short time for two or four gurries. After that I again asked the poddar baboo for the money, and he said, 'Why, I have made the payment.' I said, 'How is that—I have not

received it?' He said, 'All I know is that the payment is made.' I said, 'I have not received it; you must have paid it to some other person—some person whom you do not know.' I then made a great noise. . . . The poddar baboo sits next to the cashier baboo, and I moved from one to the other; but when I sat on the stool, that was about eight or nine cubits off." Three men were brought into court, one of whom he said was the munshi, and another (*Koylash Chunder Bose*) was the pass baboo, but the cashier baboo was not amongst them, nor was the poddar. He continued, "That poddar baboo to whom I referred does not now sit on the same seat as he used to. That man (pointing to a man in court, who gives his name as *Mohendra Nath Pyne*) sits where the old man sat. This is the cashier (gives his name as *Nobokisto Sen Gupto*)." On cross-examination, he said, "I do not know *Mohendro Coomar Pyne*. I know a man named *Mohendro*, who used to pay me before. But on that occasion *Mohendro* was not there. Before that occasion I had seen the man shewn to me, and on that occasion I saw him coming out of an inner room. There were two poddars, one a lad, but I had to do with only the senior one. Neither of the two I saw that day were amongst those I saw to-day in court. On that day I had no talk with *Mohendro Coomar Pyne*, except this, that *Mohendro* baboo took me to the Currency Office. That lad also went to the Currency Office. The senior poddar did not go to the Currency Office." He was shewn a man, *Grees Chunder Pal*, and said he went with him to the Currency Office, that he was the poddar's lad of whom he had spoken, and that he did not pay the 15,000 into his hands.

The principal witness for the defence was *Mohendro Coomar Pyne*, who said he was the poddar at the *Agra* Bank. "*Grees Chunder Pal* is one of my assistants, and *Mutty Lall Pal* is another. I remember the 15th of August last. On that date I and *Grees Chunder Pal* were paying out money. No other poddar was there on that day paying out money. I know *Sewlall*. I had known him before the 15th of August. Before that day I did not know for a fact in whose service he was, but I know that he brought cheques from *Lall Chand Kanyeram*, the Plaintiffs' firm. I saw him on the 15th of August. That is the man in Court

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(shewn *Sewlall*). On that day he came with a cheque for Rs.15,000, in favour of *Lall Chand Kanyeram*, and wanted payment of that cheque. He came up to where I was with the cheque, and in the first instance handed it to *Grees Chunder Pal*. *Grees Chunder* took the cheque and handed it to *Nobo Kisto Sen Gupta*, the note keeper. When *Sewlall* handed the cheque to *Grees* he said nothing. . . . I said to *Sewlall*, 'Wait, the notes will have to be taken out, the numbers taken down, and then payment will be made to you.' I did not say to him, 'You will have to wait half an hour.' I said nothing like it. After this the numbers of certain notes were written down, and then *Gojendro Nauth Gupta* gave over those notes and the cheque to me for payment. That is the man who wrote down the numbers of the notes, and owing to the circumstance of my having other work in my hands at the time to dispose of, I said to *Grees*, 'You call forward this man, and make over payment to him. Upon that *Grees* called out, '*Shiblall*.' A person said, 'My name is *Shiblall*.' *Grees* asked, 'Whose man are you?' He said '*Lall Chand Kanyeram's*.' I saw the person who said that, he was right in front of me, it was *Shiblall*. The same person who I have pointed out here in Court. . . . . *Grees Chunder* asked him, 'What is the amount of your cheque?' He answered 15,000. Upon this *Grees Chunder* counted over the notes and gave them to him. Before us, *Sewlall* counted out the notes one by one, wrapped them up in his kupra, and took them away. . . . . He went away with these words, 'Baboo, everything is correct.' I saw him again on that day a little more or less than an hour afterwards. I saw him again. I was still in the same place behind the counter. He came back to me and said, 'Where is the money for my cheque?' I said, 'Have you lost your senses—are you mad? You take away the money, and now come and ask for the same money again.' He said, 'I have been away getting my shoes mended.' I then said, 'Is it the case that you were robbed of the notes there?' He remained silent." On cross-examination he said, "I was counting notes and making payments to another person. That was why I could not make this payment. I was near the end of that payment. I asked *Grees*, because the two of us used to make

payments. Even if I am engaged, and five different payments have to be made, the whole of the five papers are brought to me, even though I am engaged. *Grees* and I are employed in making payments, and sometimes *Motilall Pal* makes payments. While *Grees* was making the payments I had got through the payment I was making, and was sitting down looking on." When asked when he first said to anyone that he had paid *Sewlall*, and that he had come again to be paid, he said, "I first stated that to *Modusudun* baboo. That was when he asked, 'What is the golmal about?' That was about an hour after the money was paid. All the poddars who were there in the employ of the bank are still there, not a single one of them has left. None of them have taken leave. On that day, the 15th, a baboo and a sahib came to the bank." This was Mr. *Leslie*, the Plaintiff's attorney, who is called by the witness a vakeel. Questioned, "Did you hear the vakeel make inquiry about the cheque?" he said, "Yes, I think he asked the *Kajanchi* baboo, *Modusudun* baboo. I showed him the cheque. I say I do not recollect the face of the vakeel to whom I showed the cheque. Yes, the vakeel sahib asked to whom the cheque had been paid. I said to *Seeblall*, the man of *Lall Chand Kanyeram*. The vakeel did not ask me if I could identify the man to whom payment had been made. I did not answer, How is it possible, as so many cheques are paid in the day? No, a certain baboo did not prevent my answering further questions. What the vakeel did was this. He saw the cheque and came away. I showed him the cheque, and went away to other work. The sahib saw the cheque and went away. The sahib said nothing in my presence." The value of this evidence may be tested by Mr. *Leslie's* evidence, who, in their Lordships' opinion, is a much more credible witness, and of whom Mr. Justice *Norris*, who tried the case, says in his judgment, "I believe Mr. *Leslie* implicitly." Mr. *Leslie*, upon hearing from *Sewnarain*, one of the Plaintiffs, about the cheque, went at once to the bank. He said in his evidence, "I keep a day book. I made a note on paper of what occurred at the bank, and sent it down to be entered into the day book..... I have read my note over and the entry in the day book. To the best of my recollection and belief that entry correctly

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describes what took place at the bank." The entry was put in and was this:—"*Lall Chand Kanyeram;* calling at the bank by our Mr. *S. J. Leslie,* when he found that the manager was not in, and on inquiry at the cash department was shewn the cheque with a translation of the jemadar's endorsement as '*Siblall*' on it, and on his asking the cashier to whom it was paid, he said to the man whose name was on the back of the cheque, and on his further asking him if he could identify the man, he said, 'How was it possible, as so many payments were made in the day?' While we were asking for information, one of the baboos from within the rail said to the cashier, 'Do not answer any questions, say nothing more.' The person whom he took for the cashier was a tall thin fair man, and the man who interfered was the same man who had the cheque and shewed it to us." It will be observed that *Mohendro* said he shewed the cheque to the vakeel. His evidence as to what passed is directly contrary to Mr. *Leslie's.* After the entry was put in Mr. *Leslie* said, "I saw the man who shewed me the cheque here this morning. The man with spectacles on (*Komala Persaud Soor*). That was the man who said, 'Do not answer any more questions.' I have not seen the other man to-day. There was a man something like him, but on thinking the matter over I do not think that was the man." *Komala Persaud Soor* was a witness for the defence. He said, "The poddar *Mohendro Coomar Pyne* produced the cheque to Mr. *Leslie,*" and he went on to deny that there was the conversation stated in the entry. This witness is also contradicted by Mr. *Leslie.* In addition to the estimate which the first Court formed of the relative credibility of the witnesses, it should be observed that Mr. *Leslie's* account of the nature of the interview is far the more probable one. It was his duty to examine into the facts of the case as effectively as he could, and he tells us that when he was doing that he was stopped by one of the officials. But, according to the story told by those officials, the only inquiry made by Mr. *Leslie* was so superficial that he need hardly have troubled himself to make it. The learned counsel for the Respondents relied upon the evidence of *Parat Singh,* one of the Plaintiffs' witnesses, as contradicting *Sewlall* as to *Mohendro* not being the baboo. He said that the baboo paid

him his money, that there were two baboos sitting together there, and that *Mohendro* and *Grees Chunder Paul* were the two baboos. Their Lordships do not think that this contradiction is of any value. The witness was in the habit of going to the *Agra* Bank, and may have spoken more from his general recollection of *Mohendro* being present when he received money than from his recollection of that particular occasion. *Mohendro* may then have left his seat for a time, as *Sewlall* says he saw him coming out of an inner room. *Grees Chunder* was examined, and gave similar evidence to *Mohendro's*.

A suspicious fact in the Respondent's case is that *Motilall Pal.* who was said by *Mohendro* to be one of the poddars, and sometimes to make payments, was not called, nor was his absence explained. He was a most important witness. *Sewlall* and *Mohendro* were examined on the 27th of February, and *Grees Chunder* and the other witnesses for the defence were examined on the 1st of March. *Motilall Pal* might then have been called. As regards the demeanour of the witnesses, Mr. Justice *Norris*, who tried the case, in his judgment says of *Sewlall*, "He gave his evidence in a manner which impressed me most favourably, his answers were straightforward and to the point, he showed no sign of prevarication, he was unshaken in cross-examination." Of *Mohendro* he says, "I do not believe this witness. He appears to me to have got up his story, to have rehearsed his part. The same observations apply to the evidence of *Grees Chunder Paul.* I do not believe him. I think he was swearing by the card."

Another circumstance which impresses their Lordships' minds is the failure of the bank officials to sift the case when Mr. *Leslie* went to the bank. *Sewlall's* demand involved, to say the least, a grave imputation upon the way in which the business had been conducted. In such circumstances it would be reasonable to expect that the head officer of the cash department would have inquired into the matter, and had all the poddars confronted with *Sewlall*, instead of Mr. *Leslie's* request for information being met by a refusal to answer any questions.

Their Lordships cannot agree with the learned Judges who heard the case on appeal that the alternative was simply whether

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the bank officers or some of them appropriated the money, or *Sewlall* made a mis-statement when he said he was not paid. There was another possible alternative—viz., that by mistake or inadvertence one of the poddars had paid the wrong person, and the bank officers, who may at first have thought they had paid *Sewlall*, persisted in saying that they had.

Their Lordships are of opinion, upon a full consideration of the evidence, that the decree of Mr. Justice *Norris* should not have been reversed, and they will humbly advise Her Majesty to reverse the decree of the Appellate Court, to dismiss the appeal to that Court, with costs, and to affirm Mr. Justice *Norris's* decree. The Respondents will pay the costs of this appeal.

Solicitors for the Appellants: *T. L. Wilson & Co.*
Solicitors for the Respondents: *Ashurst, Morris, Crisp & Co.*

IRRAWADDY FLOTILLA COMPANY, LIMITED . . . . . } DEFENDANTS.

AND

BUGWANDASS . . . . . PLAINTIFF.

J. C.*

1891

April 24, 25, 28.

July 4.

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Common Carriers—Liability—Indian Contract Act, 1872.

The obligation imposed by law on common carriers is not founded upon contract, but on the exercise of public employment for reward:—

Held, that the liability of common carriers in *India* is not affected by the *Indian Contract Act*, 1872. The written law relating to that liability is untouched by the Act: the unwritten law was not within its scope.

APPEAL from a judgment of the Recorder (Jan. 3, 1890), in favour of the Respondent for Rs.3315 in an action to recover the value of 195 bales of cotton destroyed by fire whilst on board the SS. *Yomah*, belonging to the Appellants.

On the 4th of December, 1888, the Respondent delivered to the Appellants, at *Myingyan*, 195 bales of cotton for carriage to *Rangoon* by their SS. *Yomah*.

After the said goods had been shipped on board the said steamer a fire broke out by which they were totally destroyed.

On the 30th of March, 1889, the Respondent brought this suit, alleging that the goods had, by reason of the negligence and carelessness of the servants of the Appellants, been destroyed by fire; and that, having regard to the circumstances attendant upon the fire, it was possible to save the goods from destruction, as the Respondent had sent a gang of coolies for such purpose, but the servants of the Appellants refused to allow them to do so.

The Appellants, by their written statement, pleaded, amongst other defences, that the goods were shipped by the Respondent and received by the Appellants on the terms and conditions that the Appellants should take such care of the goods so bailed to them as is defined by sect. 151 of the *Indian Contract Act*, 1872, to be the duty of bailees of goods; that the Appellants did take

* *Present*:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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such care of the said goods as is in the said section defined; and that, under the provisions of sect. 152 of the said Act, they were not liable for the loss of the goods so bailed to them.

The sections of the *Indian Contract Act*, 1872, are as follows:

"Sect. 151. In all cases of bailment, the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances take of his own goods of the same bulk, quality, and value as the goods bailed.

"Sect. 152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in sect. 151."

And by sect. 148, a bailment is defined to be "the delivery of goods by one person to another for some purpose upor a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of, according to the directions of the person delivering them."

The Recorder found on the facts that the fire broke out suddenly, and was not due to any negligence on the part of the servants of the Appellants: that all usual precautions were taken on the night of the fire; that, when the fire had once been detected, everything possible was done to stop it, and that its progress was exceedingly rapid; that, even assuming that an application had been made to save the cotton, with the assistance of a gang of coolies, which he greatly doubted, such application could not have been granted, as the only possible chance of putting out the fire would have been lost if the hatches had been removed; and that there was no negligence on the part of the Appellants' servants. The learned Recorder, nevertheless, considered that the case in the *Calcutta* High Court of *Moothoora Kant Shaw* v. *India General Steam Navigation Company* (1), was an express authority that the Appellants were liable as common carriers, and that such liability was unaffected by sects. 151 and 152 of the *Indian Contract Act*, 1872; and that, notwithstanding a decision to the contrary effect by the *Bombay* High Court, in *Kuverji Tulsidass* v. *Great Indian Peninsular Railway Com-*

(1) Ind. L. R. 10 Cal. 166.

pany (1), he was absolutely bound by the decision of the *Calcutta* High Court, and he gave judgment accordingly for the Respondent for Rs.3315.

Finlay, Q.C., and *R. Brown* (*J. D. Fitzgerald*, with them), for the Appellant company, contended that the judgment of the *Calcutta* High Court in the case referred to was wrong, and that the decision of this case should be in accordance with the judgment of the *Bombay* High Court (1). The delivery of the goods by the Respondent to the Appellant for carriage to *Rangoon* constituted a bailment within the meaning of that term as defined by the *Indian Contract Act*, 1872. See the preamble, sect. 1, and Chap. IX., sects. 149, 150, 151, and 158, and Act. III. of 1865. Sects. 151 and 152 apply to such a bailment as well as to bailments of every description, and defined the liability of the bailee in respect thereof, which is to be the same in all cases. [Reference was then made to the cases of *Moothoora Kant Shaw* v. *India General Steam Navigation Company* (2) and *Kuverji Tulsidass* v. *Great Indian Peninsular Railway Company* (1).] It was contended that Act III. of 1865 treated English Common Law as applicable to common carriers, and limited the liability which that law rigorously imposed. See also the *Railway Act* IV. of 1879 and Act IX. of 1890, sect. 72, sub-sect. 1. The provisions of the *Contract Act* relating to customs of trade and excepting them from the operation of the Act do not apply, for the liability of common carriers is not a matter of trade custom. The delivery of goods for carriage to a common carrier is a contract within the meaning of the *Contract Act*, and is governed by its provisions. The word "bailee" in that Act must include common carrier, for the law of common carriers is the most familiar portion of the law of bailment. The *Railway Act* of 1879 was passed the year after the *Bombay* case was decided, and appears to proceed upon the footing that the principle of that judgment was sound. It also left the Act of 1865 intact, except as regards railways; and it specially applied the Act of 1872 to carriers by railways. In the result it was contended that in *India* the liability of a

(1) Ind. L. R. 3 Bomb. 109.

(2) Ind. L. R. 10 Cal. 166.

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common carrier of goods for hire was defined and limited by the *Indian Contract Act*, 1872, and the other Indian Acts relating to carriers; and that the Appellants were not liable in this case, in the absence of negligence, the fact of which had been negatived by the Court below.

Gorell Barnes, Q.C., and *Agabeg*, for the Respondent, contended that the goods in question were delivered to and received by the Appellants as common carriers within the meaning of the *Carriers Act* (III. of 1865), and not as bailees within the meaning of Act IX. of 1872. Reference was made to Act XX. of 1886, sect. 6. Act III. of 1865 and its schedule are in force. The *Railway Act* of 1879 expressly excludes the operation of the *Carriers Act*, and does not help the other side. According to the view put forward by the Appellant, the Act of 1872 would render the Act of 1865 of no effect. The object of Act III. of 1865 was to take away the burden and to enable common carriers to limit their liability; sect. 6, for instance, would be rendered inoperative. Act IX. of 1872 is only a partial Act dealing with certain portions of the law of contract, and the Appellants are seeking to make it an exhaustive code for common carriers in abrogation of the Act of 1865, which it is nevertheless expressly said is not to be affected. It was not intended by the words bailment and bailee to refer to common carriers at all; nor was it intended by Act IX. of 1872 to repeal or modify Act III. of 1865, which was in itself a sufficient code on that subject in modification of English common law. Reference was made to *Morgan* v. *Ravey* (1). There was nothing to exonerate the Appellants from liability as common carriers; a liability which it was contended did not rest on contract at all, but on breach of duty by the carrier. It was unnecessary for the Respondents to prove that they were negligent; if it were, the destruction of his goods by a fire which the Appellants were unable to account for raised a presumption of negligence on their part which had not been rebutted: see *Scott* v. *London Dock Company* (2).

Finlay, Q.C., replied.

(1) 6 H. & N. 265.

(2) 34 L. J. (Ex.) 220.

July 4. The judgment of their Lordships was delivered by

LORD MACNAGHTEN :—

The question involved in this appeal is one which has given rise to a conflict of judicial opinion in *India*. In 1878 the High Court of *Bombay* held that the effect of the *Indian Contract Act*, 1872, was to relieve common carriers from the liability of insurers answerable for the goods entrusted to them "at all events" except in the case of loss or damage by the act of God or the Queen's enemies, and to make them responsible only for that amount of care which the Act requires of all bailees alike in the absence of special contract. In 1883 the same point was brought before the High Court of *Calcutta*. The case was referred to a full Bench, and the Court came to the conclusion that the liability of common carriers was not affected by the Act of 1872.

Their Lordships have now to determine which of these authorities is to be preferred. There is no other question in the case. It was admitted that the appeal must fail unless the decision of the High Court of *Bombay* can be supported.

For the present purpose it is not material to inquire how it was that the common law of *England* came to govern the duties and liabilities of common carriers throughout *India*. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the *Carriers Act*, 1865, an Act framed on the lines of the English *Carriers Act* of 1830 (11 Geo. 4, and 1 Wm. 4, c. 68).

The preamble of the Act of 1865 recites that "it is expedient not only to enable common carriers to limit their liability for loss of or damage to property delivered to them to be carried, but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants, or agents." The Act defines a common carrier as "a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all persons indiscriminately," and it includes under the term person "any association or body of persons, whether incorporated or not." Sect. 3 declares that no

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common carrier shall be liable for the loss of or damage to property delivered to him to be carried exceeding in value Rs.100 and of the description contained in the schedule, unless the value and description thereof are declared. Sect. 4 authorizes every common carrier to require payment for the risk undertaken in carrying such property at such rate of charge as he may fix provided that notice of a rate of charge higher than the ordinary rate is exhibited in the manner prescribed by the Act. Sect. 5 provides that in case of the loss of or damage to such property the person entitled to recover in respect of such loss or damage shall also be entitled to recover any money actually paid in consideration of the risk. Sect. 6 provides that the liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the schedule, shall not be deemed to be limited or affected by any public notice, but that any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII. of 1863, may, by special contract, signed by the owner of the property to be carried, or some one on his behalf, limit his liability in respect of the same. Sect. 7 declares that the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part, or on that of his agents or servants. Sect. 8 declares that, notwithstanding anything thereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the negligence or criminal act of the carrier, or any of his agents or servants. Sect. 9 enacts that in any suit brought against a common carrier for the loss, damage, or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage, or non-delivery was owing to the negligence or criminal act of the carrier, his servants, or agents. Sect. 10, the last section of the Act, is not material to the present inquiry. The schedule to the Act contains a list of articles of large value in small compass, corresponding with the list contained in the English *Carriers Act*.

The Indian *Contract Act*, 1872, recites that "it is expedient to define and amend certain parts of the law relating to contracts." Sect. 1 repeals the enactments mentioned in the schedule, among which the *Carriers Act*, 1865, is not included, and then proceeds as follows:—"But nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act." Their Lordships may observe in passing, and, indeed, it was admitted by the learned counsel for the Appellants, that the words "not inconsistent with the provisions of this Act," are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the sentence—if such a sentence is to be tried by any rules of grammar—seem to require that the application of those words should be confined to the subject which immediately preceded them.

Chapter IX. of the Act of 1872 treats of bailments. Sect. 148 defines bailment in words wide enough to include bailment for carriage. Sects. 151 and 152 are in the following terms:—

"151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality, and value as the goods bailed.

"152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction, or deterioration of the thing bailed, if he has taken the amount of care of it described in sect. 151."

The only section in the Act in which bailment for the purpose of carriage is mentioned is sect. 158. That section however deals only with gratuitous bailments.

The learned counsel for the Appellants took their stand on sects. 151 and 152 of the Act of 1872. They pointed out that the rule there laid down extends to every description of bailment. They argued that one measure of liability, and one measure only, is to be applied to all cases, in the absence of special contract. A special contract, they said, if not an expressed contract, must at least be a contract special to the occasion. It would be absurd

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to speak of a condition which the English common law attaches to all contracts of carriage by common carriers as a special contract. There was nothing in sect. 1 of the Act of 1872 inconsistent with this view. The *Carriers Act*, 1865, was preserved intact; it was only the common law that was altered. No usage or custom of trade was affected; the only thing affected was the custom of the realm. And if the duty cast on common carriers by the custom of the realm could properly be described as an incident of the contract between the carrier and the owner of the property to be carried, it was, as they maintained, inconsistent with the provisions of the Act of 1872.

In support of their arguments, the learned counsel for the Appellants turned to the *Indian Railway Act*, 1879, and to the *Indian Railways Act*, 1890. Their Lordships think that no assistance is to be derived from either of those Acts. The Act of 1890 reduces the responsibility of carriers by railway to that of bailees under the Act of 1872. But then it declares that nothing in the common law of *England*, or in the *Carriers Act*, 1865, shall affect the responsibility of carriers by railway. The reason for dealing with railways in this exceptional manner may, perhaps, be found in the circumstance that railways in *India* are to a great extent in the hands of the Government, and it will be remembered that the Government is excepted from the definition of a common carrier in the Act of 1865. The Act of 1879, which is now repealed, declared that nothing in the *Carriers Act*, 1865, should apply to carriers by railway. But it did not negative the application of the common law of England to such carriers. In sect. 10 it spoke of "the obligation imposed on a carrier by railway by the *Indian Contract Act*, 1872." It did not, however, declare that that obligation was to be the measure of the liability of carriers by railway, but only that their liability was not to be reduced below that limit except in a specified manner. It may be that sect. 10 was so expressed, in view of the decision of the High Court of *Bombay* which had been pronounced in the preceding year, and it may be that the Legislature then assumed that decision to be correct. But however that may be the section is much too obscure in meaning to throw any light on the present question.

Notwithstanding the able arguments of the learned counsel for the Appellants, it seems to their Lordships that there are several considerations, not all of equal weight, but all pointing in the same direction, which lead irresistibly to the conclusion that the Act of 1872 was not intended to alter the law applicable to common carriers.

The Act of 1872 does not profess to be a complete code dealing with the law relating to contracts. It purports to do no more than to define and amend certain parts of that law. No doubt it treats of bailments in a separate chapter. But there is nothing to shew that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts. On the other hand, it is to be borne in mind that at the time of the passing of the Act of 1872, there was in force a statute relating to common carriers, which, in connection with the common law of *England*, formed a code at once simple, intelligible, and complete. Had it been intended to codify the law of common carriers by the Act of 1872, the more usual course would have been to have repealed the Act of 1865 and to re-enact its provisions, with such alterations or modifications as the case might seem to require. It is scarcely conceivable that it could have been intended to sweep away the common law by a side wind, and by way of codifying the law to leave the law to be gathered from two Acts which proceed on different principles, and approach the subject, if the subject be the same, from different points of view.

At the date of the Act of 1872, the law relating to common carriers was partly written, partly unwritten, law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. "A breach of this duty," says *Dallas*, C.J., *Bretherton* v. *Wood* (1), "is a breach of the law, and for this breach an action lies founded on the common law which action wants not the aid of a contract to support it." If

(1) 3 B. & B. 62.

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in codifying the law of contract the Legislature had found occasion to deal with tort or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear. Passing from these general considerations to the language of the Act of 1872, it is to be observed that the Act of 1865 is not merely left unrepealed by the later Act. As it is not "expressly repealed" nothing in the Act of 1872 is to "affect" its "provisions." It seems a strong thing to say that the provisions of an Act are not affected, when the whole foundation upon which the Act rests is displaced, and almost every section assumes a different meaning, or comes to have a different application. Moreover, there is certainly one provision in the Act of 1865 which is deprived of much of its original significance, and, so far, at least, is rendered nugatory, if the Appellants' view is correct. The combined effect of sects. 6 and 8 of the Act of 1865 is that, in respect of property not of the description contained in the schedule, common carriers may limit their liability by special contract, but not so as to get rid of liability for negligence. On the Appellants' construction the Act of 1872 reduces the liability of common carriers to responsibility for negligence, and consequently there is no longer any room for limitation of liability in that direction. The measure of their liability has been reduced to the minimum permissible by the Act of 1865.

Another consideration is suggested by sect. 4 of the Act of 1865. That section authorizes common carriers to charge extra rates for the risk involved in carrying articles of great value in small parcels. The risk intended to be covered is the risk of carriers who are also insurers, and part of the extra charge would, of course, be in the nature of a premium for insurance. When the Act of 1872 was passed, the Act of 1865 had been in operation for seven years, and it may be presumed that common carriers, in some cases, at least, had taken advantage of the Act of 1865 in settling their rates. It seems hardly fair that common carriers should be relieved from the liability of insurers, without any provision pointing to a re-adjustment of their charges, and without distinct notice of a change affecting so materially the interests of the public.

Then the Act of 1872 provides that nothing in the Act con-

tained shall affect any usage or custom of trade. It was said that the liability of common carriers as insurers was not a usage or custom of trade. That may be conceded. But it is certainly singular that, according to the Appellants' argument, usages and customs of trade, which are local and partial, are not to be affected, while a custom so universal as to be a custom of the realm, or, in other words, part of the common law, is not treated with the same respect.

It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the Act of 1872? No one could suggest that it was inconsistent, merely by reason of its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within sect. 152; it would be a special contract saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is implied, while it would not be inconsistent if it were expressed in the contract.

These considerations lead their Lordships to the conclusion that the Act of 1872 was not intended to deal with the law relating to common carriers, and notwithstanding the generality of some expressions in the chapter on bailments, they think that common carriers are not within the Act. They are therefore compelled to decide in favour of the view of the High Court of *Calcutta*, and against that of the High Court of *Bombay*.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The Appellants must pay the costs of the appeal.

Solicitors for Appellants: *Sanderson, Holland & Adkin.*
Solicitors for Respondent: *Bramall & White.*

J. C.* 1891 June 23, 30; July 18.

BAMA SOONDARI DEBI . . . . . PLAINTIFF;

AND

TARA SOONDARI DEBI AND ANOTHER. . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Probate of Will—Evidence—Conflicting Judgments on Fact.

Case in which it was held (overruling a judgment of the High Court), that probate of a will propounded by the Appellant ought not to have been refused, and in which the evidence was held not to warrant the conclusions drawn by that Court as to the testator's mental and physical incapacity to execute the same.

APPEAL from a decree of the High Court (23rd of January, 1888), whereby a decree of the District Judge of *Mymensing* (30th of August, 1886) was reversed.

The will in suit was in the first instance propounded in a suit brought under the *Probate and Administration Act*, 1881, sect. 83, by *Gour Mohun Chuckerbutty* as Plaintiff, who was by the will appointed manager of the estate during the minority of the testator's minor son. On his retiring from the appeal, the above-named *Bama Soondari*, the testator's eldest widow, was by order in Council allowed to prosecute the appeal in his place. The Respondent, *Tara Soondari*, the testator's youngest widow, objected to the grant of probate on behalf of her minor son, and on his death as his mother and heiress.

The facts are stated in the judgment of their Lordships.

The District Judge held that as the alleged will was a registered will, as it purported to be executed by a person of full age, as it appeared to be duly signed and attested, and as there was nothing unreasonable or unusual in its provisions, the burden was on the Defendants to prove "that the Court ought to refuse probate either on account of the incapacity of the testator at the time of alleged execution, or on any other ground."

This onus he was of opinion that the Defendants had failed

* *Present*:—LORD HANNEN, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

satisfactorily to discharge, and he accordingly found for the will, and granted probate of it to *Gour Mohun Chuckerbutty*, awarding to him the costs of the litigation.

The view taken of the evidence by the High Court is thus expressed in the judgment of *Petheram*, C.J.:—

I ought to say that, so far as we can see, the will was a perfectly reasonable will, and such as a man would be expected to make under the circumstances; and there is nothing on the face of the will to indicate that it did not carry out the intention which he had formed in making it.

As I said before, the witnesses in support of the will were called, and they state that the will was made in pursuance of a prior intention which he (deceased) had expressed some days before; that he himself gave instructions for the will a day or two before its execution; that on the Sunday morning he was weak, but in perfect possession of his senses, and perfectly able to understand what he was doing, and perfectly able, physically, to sign this will in the way in which it was signed; and they said that the access of the illness did not come on until Sunday night, and that during the Sunday, he was, for all practical purposes, able to transact business, and physically equal to the exertion of sitting up and signing the will.

The only person who says anything against that, is the person who propounds the will; and he in his examination states, that three or four days before his death the testator was unable to move about in his room, he could not walk, and for two or three days before his death, he was so weak that he was unable to use his hands for the purpose of feeding himself. That is the evidence on the part of this man as to the testator's condition at that time.

The witnesses in support of the will then describe what took place and the instructions given by the testator. They describe the way in which the will was read over to him; they say that he understood it, and they describe the way it was signed by him; they also say that at the time he signed the will, he signed another document by which he authorized his wives to make various adoptions.

Now comes a fact which the Judge in his judgment has taken

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no notice of whatever, and that is the character of the signatures. The will itself is signed in six or seven different places, and the other document is also signed in several places; and when those signatures are examined, they are, to all appearances, those of a vigorous man. They are perfectly clear and even, being all alike, and are like the signatures of one man, and apparently are the signatures of a man in the perfect enjoyment of his health. This is the first fact which the Judge does not appear to have noticed, and it is a fact which seems to us of very great importance.

As I said just now, only some of the attesting witnesses to the will were called, and among those who were not called, was *Kali Chunder Acharji*, the doctor who was the family attendant of this person, and who usually attended him when he required medical attendance; and who also attended him during his last illness. He is not called. It is true that some excuses are made to account for his not being called, and it is sought to be shewn that various steps were taken to compel his attendance, and several attempts made to serve him; but in the way this is presented to us, so far as I can see, it amounts to nothing at all. No witnesses are examined as to the service. So far as we can see, this may have been a real transaction or it may have been a sham transaction. So far as we can deal with the matter of this doctor, all we can know upon the subject, is, that he was the doctor who attended the testator from the beginning of his illness, that he did sign his name as a witness to the will, and that he is not produced by the propounder of the will.

In addition to that, it appears that he was attended by two other doctors. Neither of their names appears as a witness to the will; but they are both called, and they say that the access of the fever began on the Sunday morning, and that during the whole of the Sunday, the testator was not in a condition to make a will at all; that he was not in a condition to know what he was doing, and was so weak that it seems to us impossible that their story can be true, if these signatures were attached by the testator to the will; and further, it appears to us that their testimony, if it is untrue, must be wilfully untrue, and untrue with the intention of deceiving, because they state, positively, the

condition he was in, and they contradict point-blank the evidence of the witnesses on the other side, who state that the time at which the illness became aggravated was not then, but subsequently.

That being the state of things, it was for the Judge who tried the case, as it is for us now, to consider which set of these witnesses is telling the truth. As I said just now, it is evident upon this evidence, that either one side or the other must be telling falsehoods intentionally, and the witness against the will, on whose evidence the matter, in our opinion, to a great extent rests, is a person called *Tara Nath Bal.* He is the medical man of the best position. He was called in the last thing, and he speaks to the last few days of this man; and if he is telling the truth, it is clear to our minds that this man was not in a condition to make the will on the Sunday at all, and certainly not in a condition to sign it with the degree of vigour shewn by these signatures.

We are asked to support the judgment of the Judge, and to support the will in this case, on the assumption that all these witnesses are the creatures of a person called *Prosunno*; that *Prosunno* had some spite against this man; that since his death, he, *Prosunno,* has gained some interest in his estate, which renders it necessary for his ends that this will should not be upheld, and that therefore *Prosunno* has bribed, or in some way influenced, all these witnesses to induce them to come here and tell falsehoods in *Prosunno's* interest, and, indeed, there are indications in the cross-examination of the witnesses, that they are under the influence of *Prosunno,* but nothing more; and if it were that the Judge, upon the view of the witnesses, and upon their cross-examination, had come to the conclusion and had said so, that they were the creatures of *Prosunno,* that they were telling falsehoods and were telling a concocted story got up in the interests of *Prosunno,* and that they were telling it in his interests alone, the difficulties in the case would have been greatly increased. But instead of doing that, the Judge accepts the evidence of *Tara Nath Bal* in a hesitating way; he declines to say that he believes it to be untrue, but he endeavours to reconcile it with the case of the other side. As I said just now,

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his evidence is, in our opinion, absolutely irreconcilable with the case of the other side; and unless we are prepared to go beyond the learned Judge and say that, in our opinion, the evidence of *Tara Nath Bal* and that of *Lalit Chunder Biswas*, the other doctor, is a fabrication and is untrue, we do not see our way to come to the same conclusion which the learned Judge has arrived at; and when, in addition to that, we have the fact that the other doctor who attended the testator, and whose name was attached to this will as an attesting witness, is not produced by the propounder of the will, we think that the presumption in favour of the truth of that evidence is so great that it is impossible for us to say that the learned Judge is right in the conclusion which he arrived at as to the truth of the will; and when added to that, we have the other fact, which has influenced my mind, and, I may say, has influenced Mr. Justice *Tottenham's* mind—that is to say, the character of the signatures, we are unable to believe that these witnesses were telling untruths, and that the testator, on the Sunday, at the time when he is said to have signed the will, was in a physical condition to attach so many signatures in such a vigorous way as they appear to have been attached to these documents.

In the result, we think that, accepting the statement of this testator's condition, which is given by the propounder of the will in his own cross-examination, and accepting the statement of his condition which is given by the only medical witnesses who have been called, and whose evidence is apparently believed by the learned Judge, we think it impossible to come to the conclusion that the signatures attached to the will are the signatures of the deceased; and consequently we think that this appeal must be decreed, and the probate of the will must be refused.

Doyne, for the Appellant.

Cowie, Q.C., and *Branson*, for the Respondents.

1891 July 18.

The judgment of their Lordships was delivered by

MR. SHAND:—

The question to be decided in this appeal is whether a will alleged to have been executed by the deceased *Dwarka Nath*

Chuckerbutty, bearing date the 3rd of January, 1886, two days before the death of the alleged testator, is genuine or a forgery. The District Judge of *Mymensing*, who tried the case, pronounced in favour of the will, but on appeal his decision was reversed by the High Court at *Fort William* in *Bengal*, who rejected the application for probate of the will.[1]

The alleged will was registered five days after the date it bears. The petition for probate was presented by the father of the alleged testator, who was appointed executor. The document is in all respects formal, and purports to have been signed, not only by the deceased, but by the witnesses said to have been present when it was executed; and the application for probate was accompanied by a declaration by two of these persons in the ordinary form, testifying that they were present, and saw the testator sign the will. The defence stated was that the deceased never executed any will, and that the will propounded was fictitious and false, and fraudulently got up, and in the course of the inquiry much evidence was given as to the state of the deceased, who, at the time when the deed is said to have been executed, was admittedly suffering from the serious illness of which he died—the Defenders having under their general defence maintained and endeavoured to prove that the deceased was in such a state of mental and physical incapacity as to be unfit to make a will on the date when he is alleged to have done so.

The will is one which not only complies with all requisites of formality, but which seems to be in all respects reasonable in its provisions, and such as might naturally be expected to be made, having regard to the deceased's circumstances and family relations. The deceased had three wives. By the eldest he had a daughter, and by the youngest a son, and both of these children were only six months old. There is no evidence in the case which would lead to the inference that he had any decided predilection or affection for one of his wives in preference to the others. His estate, which he seems to have acquired from his adoptive father, was of considerable value and required management, and in point of fact it had been managed for some time by his natural father, either as manager only, or in virtue of an ijara which was in force at the time of his illness. If he died

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intestate the right to his estate would devolve on his infant son, and on his decease (which in point of fact occurred before the appeal was heard in the High Court) would go to his mother, as his heir, and during the son's long minority, if he survived, the management would fall into the hands of strangers. His mother was herself in minority and incapable of taking the management. In these circumstances the alleged will, while it gives the deceased's estate to his son, should he survive minority, provides for its administration in the first instance by continuing the management in the hands of the deceased's father, failing whom other two persons—first a grand-uncle, and failing him the deceased's usual man of business is named. In the event of the son's death while still in minority, the will provides that each of the wives of the deceased, beginning with the eldest, should have the power of adopting a son who should, provided he survived the period of minority, succeed to the estates in their order; and the will further provides for the marriage expenses of his daughter "in suitable proportion to the income and disbursements" of the estate.

The genuineness of the will having been challenged, the Petitioner, the father of the deceased, and six other witnesses were examined in support of it. Five of these had signed as testamentary witnesses to the document, and all of them deposed that they were present and saw it executed. It is common ground that, unless the deceased desired to die intestate, it was obviously necessary that he should make a will, for he had been suffering from serious illness, and was in a dangerous condition. The facts affirmed by the Petitioner's witnesses were that, some days before the will was executed, the deceased requested his father to send for his ordinary man of business, *Goluck Buttacharji*, who lived at some distance away, who came on the Thursday; that *Goluck Buttacharji* had interviews with the deceased after his arrival at the deceased's house, and at a time when there is no doubt the deceased was quite capable of giving instructions for the preparation of his will, as well as with the father of the deceased, to whom his son had explained the provisions he desired to be made; that thereafter *Goluck Buttacharji* dictated the draft to *Rojoni Kant Das*, the person living in

the house, who usually wrote such papers as the deceased required to be written; that on the Saturday this draft was read over to the deceased in his bed, when he approved of it; and that on the following day, Sunday, between one and two o'clock in the day, the will was signed in the presence of the testamentary witnesses, after it had been read over, when at the same time the deceased executed an *anumati patra* to enable his wives to adopt sons who should succeed to the estates in their order, in the event of his infant son dying in minority. The writer of the will, who declared that he saw it signed by the deceased, and the other witnesses, some of whom were, according to the evidence, expressly called in to see it executed, agree in the material facts to which they speak, and there is really nothing in their evidence which could justify or support the inference that there was any want of capacity on the part of the deceased, mental or physical, to understand and execute the will. They concur in their account of the serious nature of the illness of the deceased, and in describing him as being in a weak condition, but they do not support the defence that the deceased was not able fully to understand the act he was performing; and they concur in saying that he sat up in his bed, which was on the floor, leaning against the pillows which were propped up, and so signed the document. It is clear that with this testimony, and keeping in view the fact that nothing can be said against the reasonable nature of the provisions of the will (which is always a material element in such questions, from its bearing on the probabilities of the case), it would require a strong case in defence to lead to the result of holding that the will had been forged. The Judge who saw and heard the witnesses seems to have remarked nothing in their demeanour to induce him to think they were not speaking the truth, or to lead him to the conclusion that they were combined in a conspiracy fraudulently to set up a false deed. Taking the view now presented of the evidence adduced by the Petitioner, the District Judge properly observes that "the burden is on the Defendants to prove that the Court ought to refuse probate either on account of the incapacity of the testator at the time of alleged execution, or on any other ground," and on careful examination of the evidence for the

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defence he came to the conclusion that this *onus* had not been discharged.

In the High Court this decision was reversed, substantially on the ground that it had been shewn, in the opinion of the two learned Judges by whom the case was determined, that, on the day when the will was alleged to have been executed, the deceased was incapable mentally and physically of performing such an act. The Chief Justice put the issue in this way: "The question upon which the truth of this will turns is really, had the testator become so weakened by the fever that he was incapable of signing the will in the way it is signed." In the judgment of the Court he observed that there was a fact of which the Judge of First Instance had taken no notice whatever, "and that is the character of the signatures." The Chief Justice goes on to observe that the will is signed in six or seven places, and the other document is also signed in several places, and having examined these signatures he expresses the opinion of himself and Mr. Justice *Tottenham* that they are to all appearances those of a vigorous man, being perfectly clear and even and all alike, and this circumstance, it is explained, has greatly influenced the judgment. The opinion is, however, also expressed that the evidence of the medical men called for the defence has shewn that, during the whole of the Sunday on which the will is said to have been executed, "the testator was not in a condition to make a will at all, that he was not in a condition to know what he was doing;" while in a subsequent passage the Chief Justice observes: "It is clear to our minds that this man was not in a condition to make the will on the Sunday at all, and certainly not in a condition to sign it with the degree of vigour shewn by these signatures."

It is scarcely necessary to observe that if their Lordships, after the consideration of the evidence and of the argument submitted to them on the present appeal, had come to the conclusion that the proof adduced by the Defendants or the proof as a whole led to the inference that the deceased was incapable mentally or physically of executing the will "in the way it is signed," they would agree with the Appellate Court in their judgment, reversing that of the District Judge and refusing

probate. But their Lordships are unable to adopt that view.

Neither the will in dispute, nor the *anumati patra* which is alleged to have been executed at the same time, have been transmitted with the documents in the appeal to this country. Neither of the parties seem to have applied to have this done, or to have photographs of the signatures taken and transmitted. In these circumstances, in dealing with the appeal, their Lordships will assume—subject to the observation, which they think of much importance, that there is an entire absence of any question or answer in the evidence bearing on the nature of the handwriting of the signatures, a circumstance which clearly explains why the learned District Judge did not refer to the subject—that as these signatures are written on the will they present an appearance of uniformity and of firmness, and their Lordships will immediately deal with the question whether this should affect the judgment to be given in the case. But in the first instance it seems to be desirable to ascertain how far it has been shewn that the deceased was incapable mentally of performing with intelligence the act of making a will, for if the deceased wanted the requisite mental capacity this would form a clear ground against probate as prayed for.

The important witness on this point is unquestionably *Tara Nath Bal*, the doctor, who was called in during the latter part of *Dwarka Nath Chuckerbutty's* illness, and who was examined for the defence. He has been treated by the District Judge and the Court of Appeal as a witness entitled to credit, though the former makes the observation that his intimate connection with *Prosunno Babu*, who appears not to have been on very good terms with the deceased, and who has a pecuniary interest in the case, favours the presumption of a certain amount of bias on his part. *Prosunno Babu* appears to have had such interviews with most of the witnesses for the defence, immediately before their examination, as lead to the suspicion that they were being schooled as to the evidence they should give, and his connection with *Tara Nath Bal* certainly seems to warrant the inference that this witness would not give a more favourable account of the condition, mental and physical, of the deceased than the facts

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warranted. He went to attend the deceased five days before his death. Speaking of the first two of these days he states that his patient did not seem to be unconscious. On the second day he says, he "could not particularly perceive unconsciousness," although at intervals his patient may have spoken one or two incoherent words. He subsequently says that the serious illness began on Sunday morning, but that "on Sunday up to evening he did not talk incoherently," while in a subsequent passage of his evidence, in a conversation on the Sunday with *Raj Chundar*, or *Gour Mohun*, or *Goluck Buttacharji*, when he says the making of a will was spoken of, he states, "I may have said that instead of doing this to-day it may be done to-morrow as well."

Their Lordships cannot regard the evidence of this witness as warranting the conclusion on which, to a great extent, the judgment of the High Court is founded, that on the Sunday when the will is said to have been executed the deceased was incapable, either mentally or physically, of executing the will. The witness *Lalit Chunder Biswas*, who was for a time, during the earlier part of the deceased's illness, present as medical attendant, but who says he visited the deceased, apparently as a friend, till he died, gives somewhat stronger evidence, but his statements seem to be exaggerated in material respects when tested by the other evidence in the case. The evidence of *Tara Nath Bal* is in its terms qualified throughout, and in their Lordships' opinion results in this, that although the deceased was in a weak condition, and his "condition commenced to be worse" on the Sunday, he was nevertheless capable throughout that day of understanding and executing the will in dispute.

Again, in regard to the ability of the deceased to write the signatures firmly, it does not appear to their Lordships that there is evidence to lead to the conclusion that he was unable to do so. The witness *Tara Nath Bal* states that on Sunday the patient could sit resting against a pillow, and the witnesses for the Petitioner all say that it was in this attitude that the will was signed, while more than one of them states that the deceased rested his left hand on the pillow, holding the document in that hand and signing with his right hand. According to the evidence he had himself suggested that he would delay signing it

till after taking food, and he did so; and, in the performance of so deliberate and solemn an act as signing his will, he would naturally make an effort such as might enable him, although in a weak state, to write his signatures with firmness. In the High Court it was observed that the District Judge had taken no notice of the characters of the signatures. But to their Lordships this circumstance seems to be fully accounted for by the fact that the point does not seem to have been made the subject of examination in the evidence, or of observation in the argument, so far as appears. The Petitioner himself gives the strongest evidence, perhaps almost the only evidence, which indirectly gives some support to the view that the deceased might be unable to write with a firm hand, when he says the deceased latterly was unable to feed himself; but neither this evidence, nor that of the witnesses generally, would in the opinion of their Lordships warrant the conclusion that on the Sunday in question the deceased was unable, on so important an occasion, to write his signatures, and, by an effort, to do so firmly.

It would no doubt have been more satisfactory in the determination of the case if the testamentary witness, the doctor *Kali Chunder Acharji*, and indeed also the mokhtar *Goluck Buttacharji*, who, though not present at the signing of the will, had prepared the draft, had been examined as witnesses. There is some evidence that the Petitioner did endeavour to secure the attendance of *Kali Chunder Acharji*, and if it be the case that his evidence could have been obtained, and it would have been unfavourable to the will, the Defendants might have examined him. As the case on the proof stands the Petitioner, in the opinion of their Lordships, adduced sufficient evidence to establish the genuineness of the will and the capacity of the testator to make it, and the evidence for the defence was not sufficient to destroy the Petitioner's case on either of these points.

On the whole, their Lordships will humbly advise Her Majesty to reverse the judgment of the High Court, and to affirm the judgment of the District Judge, with costs in the High Court. The Respondents must bear the costs of this appeal.

Solicitors for the Appellant: *T. & L. Wilson & Co.*

Solicitors for the Respondents: *Sanderson, Holland, & Adkin.*

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WAJID KHAN . . . . . PLAINTIFF;

AND

RAJA EWAZ ALI KHAN . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Voluntary Conveyance—Onus probandi—Fiduciary position of Grantee.

Where the grantor is a purda nashin, old, illiterate, and incapable of business, the grantee her confidential managing agent, and the grant is made without any valuable consideration, and confers on the grantee under the disguise of a trust, an important pecuniary benefit:—

Held, that the *onus* is on the grantee of shewing conclusively that the transaction is honest, *bonâ fide*, well understood, the subject of independent advice, and free from undue influence.

APPEAL from a decree of the Judicial Commissioner (Aug. 29, 1887), affirming a decree of the District Court of *Rae Bareli* (Oct. 2, 1886), which dismissed the Appellant's suit.

The Appellant on the 27th of August, 1885, sued for a decree declaring his title to the possession of twenty-nine villages belonging to the estate of *Mahona, Zillah Sultanpur*, in the province of *Oudh*. The suit was based upon a document dated the 21st of June, 1865, which the lower Court found to be a will. This document was executed by one *Rani Sadha Bibi*, in favour of one *Dalmir Khan*, the father of the Appellant.

Some time previous to the execution of the document, *Rani Sadha Bibi* had been recorded in the settlement records as being in possession of the property, for her life, with the consent of the Respondent *Ewaz Ali Khan*, and his brother *Jamshed Ali Khan*, who are nephews of *Raja Ali Baksh Khan*, the deceased husband of *Sadha Bibi*.

The circumstances under which the document was executed are stated in the judgment of their Lordships.

On the 18th of February, 1872, *Rani Sadha Bibi* filed a registered application whereby she revoked and set aside the

* *Present*:—LORD WATSON, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

document of the 21st of June, 1865. She died on the 27th of August, 1873, and *Dalmir Khan* died in November, 1877.

The suit was resisted by the Respondent upon various grounds of law and fact.

His main contention was, that the document of the 21st of June, 1865, had been improperly obtained from *Rani Sadha Bibi* by her confidential agent *Dalmir Khan*, who availed himself of his fiduciary position, to exercise undue influence upon, and act in a fraudulent manner towards his principal, a purda nashin lady of advanced years, illiterate, incapable of managing her affairs, and without the assistance of any one to whom she could turn for independent advice. He also pleaded (*inter alia*), that the said document, if it could be regarded as a will, had been cancelled by the application of the 18th of February, 1872.

Six issues were recorded, but the judgments of the Courts below proceeded only upon these.

1st. Whether the deed of the 21st of June, 1865, was executed by *Rani Sadha* under undue influence?

2nd. Whether she ever revoked the deed?

The District Judge held that the instrument of the 21st of June, 1865, was of a testamentary character, with which the Judicial Commissioner concurred, and on the first of the above issues expressed his "opinion that the deed was not proved to have been executed under conditions such as a Court of Equity would recognise to be sufficient to operate as a disposition of property."

The District Judge said that it was not disputed before him that the *Rani* was sixty-five years of age, and a purda nashin, and illiterate, and that "*Dalmir Khan* was her most confidential karinda, and stood in a position of active confidence and trust," and that the rule followed by Courts of Equity in such cases was "that he who bargains in a matter of advantage with a person placing confidence in him is bound to shew that a reasonable use has been made of that confidence," and that in the absence of such proof, Courts of Equity treat the case as one of constructive fraud.

Upon the second question, regarding the alleged revocation of the instrument of the 21st of June, 1865, the District Judge

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said that "the revocation of the will by *Rani Sadha's* registered application of the 18th of February, 1872, was in his opinion sufficiently established."

The Judicial Commissioner concluded his judgment dismissing that appeal, and affirming the judgment of the First Court in these words:—

"In my judgment the document of June, 1865, was made through the undue influence of *Dalmir Khan* upon the executant, an aged purda nashin lady, illiterate, friendless, and entirely dependent upon *Dalmir Khan*, her sole confidential adviser, and man of business, and I consider that the avowed object of the testamentary document in question, viz., the defrayal of the expenses of her (and her husband's) mausoleum, was wholly disproportionate to the large revenue which the said document purported to assign for the purpose, and that *Dalmir Khan* in obtaining the document to be executed in his favour, abused the confidence of *Rani Sadha Bibi*, and that on these grounds the document is not one which ought to be enforced."

Doyne, for the Appellant, contended that both Courts were wrong. The petition of the 18th of February, 1872, shewed that the parties thereto recognised at that date the continuing existence and *bona fides* of the endowment in question. The evidence was sufficient to shew the Rani's intention to dedicate the twenty-nine villages to the purposes mentioned in the instrument of the 21st of June, 1865. Having once validly constituted the endowment, and appointed *Dalmir Khan*, and his heirs in perpetuity, managers of the villages, with the right to possession, it was not competent to the Rani afterwards to revoke that appointment, and substitute other managers. Besides, her intention to do so was not proved.

Ross, for the Respondent, was not heard.

The judgment of their Lordships was delivered by

LORD MORRIS:—

In this case a suit was filed by the Appellant, *Wajid Khan* the son of one *Dalmir Khan*, seeking to have a declaration of

right to possession of certain villages under a deed or will of the 21st of June, 1865, purporting to have been executed by *Rani Sadha Bibi*, the widow of *Raja Ali Baksh*, in favour of *Dalmir Khan*. The District Judge and the Judicial Commissioner of *Oudh* decided against the Plaintiff; and both those Courts decided substantially on the same ground, that the document was executed under circumstances in which it could not be supported.

For the purposes of their Lordships' judgment it appears to them that it is not necessary to consider whether the document should be construed as a deed of present conveyance or a will, because in neither aspect can it be upheld. *Dalmir Khan* held a highly fiduciary position in regard to *Rani Sadha Bibi*, who was alleged to have executed it; she was a lady sixty-five years of age and comparatively illiterate, and she does not seem to have had any adviser or counsellor except *Dalmir Khan*, who appears to have had great influence over her, for one of the exhibits in the case is a will made by her in his favour in the year 1862, only some three years before the execution of the document which is in question in this case. He certainly filled such a position towards her as to render it incumbent upon him to shew that he had made a proper use of the confidence reposed in him by her, and that the execution of the document, granted without any valuable consideration and from which he obtained important pecuniary benefit, was free from all attempt at undue influence. In the opinion of their Lordships the *onus* lay upon him to do so; because, although the deed of 1865 at first provides that this lady sets apart twenty-nine villages of her patrimony, producing a rental of Rs. 9993 a year, to defray the expenses of her tomb and that of her deceased husband, it goes on to say that *Dalmir Khan*, her managing agent, shall have the management of the endowment in perpetuity, generations after generations, and that under every circumstance he shall have full power for good or for evil. *Dalmir Khan* thus became the person substantially interested, because, looking at the facts of the case, it would appear that a comparatively small portion of this large fund could be annually allocated to the expenses of the tomb, and that a large surplus would each year remain in his hands.

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Under these circumstances *Dalmir Khan* is brought within all the well-recognised principles which have been already referred to in the discussion of this case by more than one of their Lordships, namely, that every *onus* is thrown upon a person who fills such a character as he did, of shewing conclusively that the transaction was an honest one, and a *bonâ fide* one, as to which a woman in the position of this lady had had some independent advice, or some opportunity of knowing exactly what she was about, and in which she was not under the complete influence of her manager. Their Lordships are clearly of opinion that this instrument is one that cannot be sustained; that it is not a *bonâ fide* instrument; and that the *onus* which their Lordships consider lies upon *Dalmir Khan's* representative has not been sustained, namely, that of shewing that this was a proper transaction considering the relationship of the parties.

Then it is said that although *Rani Sadhi Bibi* revoked this deed in 1872 by a registered petition, it was a deed *in præsenti* which could not be revoked, at all events in so far as the endowment was in the nature of a dedication of her property to the expenses of her husband's and her own tomb, and that the petition itself recognised at that time the continuing existence and validity of the endowment. But if the instrument was bad in the beginning, at all events as regards the benefit which *Dalmir Khan* took under it, it is difficult to see how his representative is prejudiced by its revocation in 1872, which if valid puts an end to the instrument, and if invalid could not set up an instrument that was bad in itself. Their Lordships are clearly of opinion that the instrument was bad *ab initio;* that it was improperly obtained by a person in a fiduciary character; and that even if there were no *onus* on *Dalmir Khan's* representative to prove the honesty of the transaction, all the facts of the case go to shew that there was active undue influence.

Upon these grounds their Lordships will humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court below should be affirmed. The Appellant must pay the costs of this appeal.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondent: *Barrow & Rogers.*

SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } DEFENDANT ;

AND

NELLAKUTTI SIVA SUBRAMANIA TEVAR PLAINTIFF.

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ON APPEAL FROM THE HIGH COURT AT MADRAS.

Construction of Sunnud—Generality of Grant not limited by a Marginal Specification—Proof of Possession—Proof of Title.

Held, with regard to a sunnud in 1803, conferring upon a zemindar, his heirs and successors, an absolute grant of the zemindary, "as then held and possessed by the grantee," that such grant was not limited by the terms of a marginal note in the sunnud, specifying the names of three villages then comprising the zemindary, but operated to pass all lands which could be shewn, either by direct evidence or as matter of reasonable inference, to have been held and possessed by the zemindar at the date of the sunnud.

Held also, that, the zemindar having all along exercised rights of grazing, cutting timber, and collecting mountain produce over the whole area claimed, in part exclusively, in part concurrently with a certain amount of user by the inhabitants of Government villages, such acts of possession must be ascribed to his title, and that the said user not having been in assertion of a conflicting proprietary right, and whether or not sufficient to raise rights of easement, could not displace the zemindar's proprietary title.

APPEAL from a decree of the High Court (April 30, 1885), partly affirming and partly reversing a decree of the District Judge of *Tinnevelly* (Jan. 8, 1883).

The Respondent, as the zemindar of *Singampatti*, in the *Tinnevelly* district, sued the Government, on the 29th of July, 1881, under *Madras Act* XXVIII. of 1860, sect. 25, to set aside a decision of the Settlement Officer, of the 6th of April, 1880, and to recover possession of a large tract (about forty-eight square miles) of mountain and forest land, which he alleged to have been immemorially in the possession of the zemindars of *Singampatti* as a portion of the zemindary, until his dispossession by the Government on the strength of the said decision.

The Respondent, by the schedule to his plaint, divided the

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tract sued for into three, of which the first, or eastern tract, was of an estimated area of twelve square miles; the second, or central tract, was of nearly a square mile in area; and the third, or western tract, was of an estimated area of nearly thirty-five square miles.

Those tracts were all claimed by the Appellant as falling outside the Respondent's zemindary, and, therefore, belonging to the Government as undisposed of lands.

The District Judge held that, on the evidence, the Respondent and his predecessors had, as to the western tract, enjoyed, to the exclusion of all other persons, the cutting of wood, the gathering of wild produce, and the grazing of cattle over the whole tract, being in truth all the acts of enjoyment of which the district was capable, and in this conclusion of fact the Court of Appeal concurred.

The Courts below also concurred in holding, as to the first and third tracts, in opposition to the finding of the Settlement Officer, that the Respondent had rights, which the first Court held to be "rights of pasture, wood cutting, and gathering of wild products," in the nature of easements; whilst the Court of Appeal held the right of the Respondent, in all three tracts, to be a proprietary right to the soil.

As to the central tract, the District Judge disallowed the Respondent's claim, as he said that no evidence had been given as to it.

The High Court was of opinion that the acts of enjoyment established by the evidence were not to be regarded as "mere easements," but as proof of a title to the profits, and declared that there was "no reason to doubt that all the hills to which the suit referred (*i.e.*, including the central tract) were included in and formed part of the zemindary as it existed in 1803" (*i.e.*, when the sunnud was granted), "and as it had been enjoyed by the Respondent's family prior to the permanent settlement."

The High Court consequently by its decree confirmed so much of the decree of the first Court as set aside the decision of the Settlement Officer, and reversed so much as dismissed the Respondent's claim to the three tracts in question, and gave the Respondent a decree for possession of those tracts with mesne

profits, and ordered the Appellant to refrain from interfering with the Respondent's possession, but reserved any rights of vicinage enjoyed by any neighbouring ryots.

The material passage of the High Court's judgment is as follows:—

"In principle the act done is one of ownership or evidence of easement, according as the person doing it asserts general ownership or a particular right in another's property; and in the first case the act of enjoyment is designated possession, and in the latter case *quasi* possession. Such being the distinction in principle between acts of ownership and acts which are done in the exercise of easements, we are unable to support the conclusion at which the Judge has arrived, viz., that the Appellant's rights are mere easements. It may be that specific portions of the hills were not regularly cultivated, but such cultivation is not necessary when other acts of ownership are done upon them. As already observed, there is evidence of acts of enjoyment done in the open assertion of title as owner, and the ayakut accounts and the special circumstances of the case warrant the presumption that such acts were done for more than sixty years, if not from time immemorial. As to the interference by officers of Government with the enjoyment by the zemindar of his rights in full, there is no evidence to shew that such interference was accompanied with a denial of the zemindar's right as owner. The enjoyment of any right of ownership over the soil, whether it be the cutting of timber or of turf, or the gathering of produce, is *primâ facie* proof of ownership of the soil; and, when the District Judge found that there had been such an enjoyment of the forests as proved a title to the profits, he was logically bound to find a title established to the soil, seeing that the enjoyment had been throughout accompanied with an assertion of such ownership. We see no reason to doubt that all the hills to which the suit refers were included in, and formed part of, the zemindary as it existed in 1803, and as it had been enjoyed by the Appellant's family prior to the permanent settlement."

The Court concluded by saying:—

"We are of opinion that the acts of enjoyment proved in this case are acts of ownership done adversely to the Respondent;

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and that as the adverse possession has extended to more than sixty years, the Appellant has acquired a title by prescription."

Robinson, Q.C., and *Mayne*, for the Appellant, contended that there was no evidence that the Respondent's family had any possession of these hills prior to the permanent settlement. As regards the central tract, there was no evidence relating to it. As regards the eastern tract, it was vague and insufficient. As regards the western tract, it did not prove an actual proprietorship of the soil in the zemindar. The effect of the evidence recorded was simply to shew that rights which existed in the undisputed land had been carried by way of encroachment into the adjoining tract. The documentary evidence was relied upon as shewing that even within the limits within which the Government recognised certain rights as being possessed by the zemindar, it claimed a paramount authority to restrain him in the exercise of those rights in a manner inconsistent with his proprietary title. As regards a title by prescription, it would be necessary to prove sixty years' adverse possession as against the Crown. That proof had not been given, and if it had the Respondent would not be entitled to the land in suit as part of his permanently assessed zemindary, but as land liable to be assessed.

Rigby, Q.C., and *Doyne*, for the Respondent, were not called upon.

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The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is taken by the Secretary of State for *India* in a suit instituted before the District Court of *Tinnevelly* by the Respondent, the zemindar of *Singampatti*, for cancellation of a decision of the Government Survey Officer, dated the 10th of April, 1880, and for a declaration of his title to certain tracts of mountain land, covered with forest and jungle, as being parts of his zemindary.

The villages and cultivated lands of the zemindary are situated on the plains, and are contiguous to lands and villages belonging to the Government of *India*. These lands lie at the northern

base of a mountain range whose crest or watershed runs nearly due east and west, rising to an elevation varying from 3850 to 4900 feet above sea level. The watershed is a well-defined natural line, and forms the northern boundary of the territory of *Travancore*.

The Respondent was a minor when he succeeded to the zemindary, and did not attain majority until the year 1880. Until 1867 his estate was managed by his mother; and from that date until 1880 it was under the management of the Court of Wards.

For a considerable period antecedent to the year 1865, it appears to have been well known to the Government that the zemindars of *Singampatti* claimed as their property the extensive hill tract lying between their cultivated lands and the *Travancore* boundary. In that year the Government began, for the first time, to suggest doubts as to the validity of their right; and, in 1870, a demand was made for production of the evidence of their title. A report was thereafter made by Lieutenant *Campbell Walker*, which was submitted to the Government pleader; but no further steps were taken in the matter until October, 1879, when an order was issued directing a survey officer, empowered under the Boundary Act, to take up the settlement of the case.

That order was carried out by Mr. *Baber*, who, after making inquiries and personally surveying the tract in dispute, issued his report and decision on the 6th of April, 1880, with a relative plan prepared by him, which shews the whole area then claimed, and also that portion of it which he held to be part of the zemindary. The latter, roughly estimated, comprehends about one half of the area claimed, and forms the north-western portion of that area. The lands which Mr. *Baber* held to be Government property consisted of a tract varying in breadth lying outside the eastern and southern boundaries of the lands assigned by him to the zemindar.

In this suit, which was brought by the Respondent in July, 1880, after he became of full age, the Government concede, as they have all along done, his right to the land to which he was found to be entitled by the decision of their survey officer. The subjects now in controversy are described in the plaint as

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consisting of three parcels. The first, which has been termed in these proceedings the eastern tract, does not include the whole area to the east which was claimed before and disallowed by Mr. *Baber*, but only that portion of it, about twelve square miles in extent, which lies to the north of the river *Varattar*. The second, termed the central tract, about one square mile in extent, is bounded on the north by the land now admitted to be the Respondent's, on the east by the *Kusavankuli* River, which is also, in that locality, the eastern boundary of the admitted land, on the south by *Travancore*, and on the west by the third tract claimed. That third or western tract, which extends to thirty-five square miles, is bounded on the north by the lands awarded to the zemindar in April, 1880, on the east by those lands and by the central tract now claimed, on the south by the *Travancore* boundary, and on the west by the river *Tambraparni*, which is also the western boundary of the lands to which he has already been found to have right.

The title of the Respondent is a sunnud, dated the 22nd of April, 1803, granted by Lord *Clive* to his ancestor, *Nallakutti Teven*, then zemindar of *Singampatti*. The sunnud contains the usual recitals, one of these setting forth that the object of the grant was to confer upon the zemindar, his heirs and successors, "a permanent property in their land in all time to come." It contains no specification or description of the lands which it was intended to carry, but is a grant in general terms of the zemindary as then held and possessed by the grantee. There is a marginal note specifying the names of three villages then composing the zemindary; and it was suggested in the argument for the Appellant that the effect of the note is to limit the grant to these three villages and a limited area in their immediate vicinity, and to exclude the claim of the Respondent for any land beyond these limits which is not shewn to have been subsequently acquired from the Government by prescription. Their Lordships do not think that a marginal specification of the villages existing at its date can control the plain terms of the grant, or can be taken as definitive of the extent of land, cultivable or not, which was then held and possessed by the zemindar of the villages enumerated. In their opinion, the

Respondent must prevail in this suit, if he has been able to shew, either by direct evidence or as matter of reasonable inference, that the lands now in dispute were held and possessed by the zemindar at the time when he obtained a permanent title from the Government.

The issue settled in the District Court for the trial of the cause upon its merits was, simply, "Whether the right to and possession of the property in dispute belonged to Plaintiff or to Government?" Documentary and oral evidence was adduced by both parties, into the details of which their Lordships find it unnecessary to enter, because of the unanimity of the conclusions in fact which both Courts below have derived from it. It is sufficient to say that there is evidence of both kinds tending to prove that the zemindars had, for a period beyond living memory, or at least for fifty years past, uniformly asserted their right to all the tracts now claimed, by including them in leases of their hill land. Not only so, but in the year 1843 the Government Collector, who was at that time in possession of the zemindary for arrears of revenue, granted a lease of the hill lands and their products, in which these tracts were expressly included; and a Collector who was in possession in the years 1857–1858 also dealt with them as forming part of the zemindary. On the other hand, there is no evidence tending to prove that, before the challenge which ultimately led to the present litigation, there was any similar assertion of right, either on the part of the Government or of any other person.

Whether there has been a persistent claim of right to a tract of land is, their Lordships need hardly say, a question of fact. Such assertion being proved, all questions as to the amount of use and enjoyment of the tract by the claimants, and as to the sufficiency of such use and enjoyment to constitute possession of the whole extent claimed, are also, in the opinion of their Lordships, pure questions of fact.

The District Judge held it to be established by the evidence that, throughout the third or western tract, the zemindars of *Singampatti* had all along exercised the exclusive right of grazing cattle, cutting timber, and collecting mountain produce. With regard to the first or eastern tract, he found that the

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zemindars had exercised rights of precisely the same kind over the whole tract, but not to the exclusion of a certain amount of user by inhabitants of Government villages. Upon these findings the learned Judge came to the conclusion in law that the possession of the western tract by the Respondent and his predecessors ought not to be ascribed to a title of property, but that it was sufficient to give him right to exclusive easements of pasturage, cutting timber, and collecting mountain produce, over its whole area. As to the western tract, he held that the Respondent was entitled to easements over it of the same character, but not exclusive. The only observation upon the second or central tract which occurs in his judgment is to the effect that "it appears to be of comparatively little value, and no evidence regarding it was produced on either side."

The result was that the learned Judge set aside the decision of the survey officer, which found that the Respondent had no interest in the disputed lands; and pronounced no further order beyond finding neither party entitled to costs.

On appeal, the High Court adopted the findings of the District Judge with respect to the zemindars' exclusive possession of the western tract, but rejected his legal inference that the right thereby constituted was in the nature of easement, and held that it amounted to a full right of ownership. In that view of the law their Lordships entirely concur. Having regard to the character of the subjects in controversy, the exclusive possession which the zemindars are, by concurrent judgments, found to have enjoyed, appears to them to have in no particular fallen short of proprietary possession. There is no ground for presuming that a proprietor whose title was clear, and who was desirous of turning his estate to the best account, would have occupied or used the subjects in any other way than they did. When that circumstance is taken in connection with the fact that the zemindars had a title which will aptly include these subjects, and that their acts of possession have invariably been ascribed to that title, the inference drawn by the High Court appears to be inevitable.

The learned Judges of the High Court also expressed their concurrence in the findings of the District Judge with respect to

the zemindars' possession of the eastern tract, but came to the conclusion that their possession alone was that of proprietors, and that the proved acts of user by ryots from neighbouring villages were not of that character. On examining the judgments of the two Courts, their Lordships were satisfied that the possession of the zemindars as found by both would, in the absence of conflicting possession sufficient to cut down or qualify their right, entitle the Respondent to a declaration of his proprietorship. But it did not seem to be equally clear that the two Courts were altogether agreed as to the extent and character of the stranger ryots' possession; and they accordingly permitted the Appellant's counsel to bring before them all the evidence bearing on that point. Their Lordships are unable to affirm that there was any difference of opinion in the two Courts upon that point; but whether that be so or not, they are satisfied, upon the evidence, that the decision of the High Court is right. Beyond what may be implied in the acts themselves, there is nothing to shew that aught done by these stranger ryots was in the assertion of right; and, assuming the statements of the Appellant's witnesses to be absolutely true, the acts of user to which they speak are neither in amount nor quality sufficient to displace the proprietary title of the zemindar. Whether the evidence would *per se* be sufficient to raise rights of easement, and if so in whose favour, are issues which do not arise in the present case.

The High Court, differing from the District Judge, held that the Respondent has proved his title to the second or central tract claimed; and in that finding also their Lordships concur. It is not easy to understand why the tract was made the subject of a separate claim. It adjoins the hill lands which have been found to belong to the zemindary; it lies within their natural limits, namely, the *Kusavankuli* River on the east, and the watershed on the south. There is nothing to suggest that it was ever claimed or possessed by any other person; whilst it was persistently claimed and treated by the zemindars as part of their estate. In these circumstances their Lordships are of opinion that their proprietary possession of the hill lands adjoining is sufficient to establish their title to the central tract.

The High Court, upon these findings, allowed the appeal,

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reversed so much of the decree of the Court below as dismissed the Respondent's claim, and decreed the claim as made, with costs in all Courts. Being of opinion, for the reasons already indicated, that the decision of the High Court is right, and ought to be affirmed, their Lordships will humbly advise Her Majesty to that effect. The Appellant must pay to the Respondent his costs of this appeal.

Solicitor for Appellant: *Solicitor to the India Office.*
Solicitors for Respondent: *Lawford, Waterhouse, & Lawford.*

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HANUMAN KAMUT . . . . . PLAINTIFF;

AND

HANUMAN MANDAR AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation — Act XV. of 1877, *Sched. II. art.* 97—*Subsequent Failure of Consideration.*

In a suit in 1885 to recover back purchase-money and interest, it appeared that the Plaintiff was a purchaser in 1879 from the father of a Mithila joint family, whose co-sharers, on the 22nd of December, 1880, successfully resisted registration of the Plaintiff's name by the Collector, and afterwards defeated his suit for possession:—

Held, that, even if the consideration did not fail originally, its subsequent failure was complete when the Plaintiff was first prevented from taking possession. Consequently, under article 97, Sched. II., of Act XV. of 1877, the suit was barred.

Quære, whether it was also barred under sect. 43, Civil Code Procedure, 1882, the relief prayed for not having been included in the suit for possession as an alternative claim.

APPEAL from a decree of the High Court (June 14, 1887), affirming a decree of the Subordinate Judge of *Bhagulpore* (March 22, 1886).

The facts of the case are as follows:—

Dowlut Mandar, in 1867 and in 1869, as karta of the joint family composed at date of suit of the Respondents, acquired

* *Present:*—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

by two purchases, one in the name of his eldest son, the Respondent *Hanuman*, and the other in the name of his grandson, the Respondent *Sarobur*, eight annas or one-half of mouzah *Jajhutsabaila*, for the benefit of the joint family.

On the 1st of August, 1879, *Dowlut Mandar*, in consideration of Rs.3600, then paid to him by the Appellant, executed to him a deed of sale of two and a half annas of that mouzah.

On the Appellant applying to the Collector for mutation of those two and a half annas into his name, objections were made by *Hanuman* and *Sarobur*, and allowed by the Collector on the 22nd of December, 1880.

Thereupon the Appellant instituted his first suit on the 16th of March, 1881, in the Court of the Subordinate Judge of *Bhagulpore*, against *Dowlut Mandar* and his five sons and his grandson, *Sarobur Mandar*, and asked to have effect given to his purchase, and possession of the purchased share, with registration, decreed to him.

He did not ask in the alternative for return of the consideration-money, in case he should not be held entitled to possession.

Hanuman Mandar and his son *Sarobur* alone defended that suit, alleging that they were separate in estate from *Dowlut Mandar*, and had acquired the eight-anna share of the mouzah with their own separate moneys.

The Subordinate Judge, with whom, on appeal, the District Judge concurred so far, held that the purchase of that eight-anna share was made by *Dowlut Mandar* out of the joint family funds for the joint family, and that there was no separation of *Hanuman* and *Sarobur* from the joint family.

And he further held that the consideration-money was paid to and the deed of sale was executed by *Dowlut Mandar*, with the consent of the other Defendants, who had not attempted to shew that *Dowlut Mandar* had "sold for immoral purposes, and applied the consideration-money to such purposes," and he consequently held the Appellant entitled to a decree.

On the appeal of *Hanuman* and *Sarobur* to the Court of the District Judge, the District Judge, on the 18th of December, 1882, reversed the decree of the first Court, and wholly dismissed the Appellant's suit.

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The ground on which the District Judge rested his judgment was, that though he concurred with the Lower Court in holding that the deed was executed *boná fide*, and that the consideration was paid to *Dowlut Mandar*, and that *Dowlut Mandar* and his sons and grandson were then jointly possessed of the eight-anna share of the mouzah in question, he differed from the Lower Court in holding that "the sale to the Plaintiff was made without the consent of the contending Defendants, and that there was no good ground for thinking that it was effected for the benefit of the joint family," and that, therefore, the contending Defendants, *Hanuman* and *Sarobur*, were not bound by the sale.

And the District Judge further held, on the authority of the Full Bench decision of *Sadabart Prasad Sahu* v. *Foolbash Koer* (1), that it was not open to him to decree the Plaintiff's claim as against *Dowlut Mandar* and the other non-contending Defendants, as it had been decided in that case "that a member of a joint undivided Hindu family had no authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family property in order to raise money on his own account, and not for the benefit of the family," and the District Judge was of opinion that this case fell within the same principle of law.

The final decree was that of the High Court, which, on the 5th of March, 1884, dismissed the appeal.

A year afterwards, viz., on the 4th of March, 1885, the Appellant brought the present suit to recover from the Respondents, as joint heirs, according to the Mithila law, of one *Dowlut Mandar*, deceased, the consideration with interest paid by the Appellant to *Dowlut Mandar*, for the sale on the 1st of August, 1879, of two and a half annas of a village called *Jajhutsabaila*, the joint property at the time of sale of the deceased *Dowlut Mandar* and of the Respondents in this suit. That consideration, it was contended, failed by reason of the Appellant being successfully opposed in a previous suit by the Respondents *Hanuman Mandar* and *Sarobur Mandar*, when he sought to obtain possession, on the ground that *Dowlut Mandar*, as a member of a joint family, could not, according to the Mithila law, sell his undivided share of the

(1) 3 Beng. L. R. F. B. 31.

said village, and that the sale in question did not bind those Respondents, as it was not proved to have been made with their consent and for their benefit.

The first Court dismissed the suit under the third paragraph of the 43rd section of the Civil Procedure Code, 1882, on the ground that when the Plaintiff previously, in March, 1881, in accordance with the deed of sale to him, sued for possession, he might also have asked for compensation in addition to, or in substitution for, "specific performance."

The 43rd section relates to the inclusion by a plaintiff in his suit of his whole claim, and the third paragraph is as follows:—

"A person entitled to more than one remedy in respect of the same cause of action, may sue for all or any of his remedies; but if he omits (except with the leave of the Court, obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted."

The High Court was of opinion that the first Court was in error in holding that the suit was barred under the 43rd section of the Civil Procedure Code, but held that the suit was barred by limitation under the 62nd article of the Second Schedule of Act XV. of 1877.

That article prescribes three years, beginning to run from the time when the money is received, as the period within which suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use" must be brought.

The learned Judges expressed their opinion that the consideration of the conveyance in question "was money received to the plaintiff's use, by reason of the fact that the consideration for it wholly failed," and was "a failure from the beginning."

This Appellant's contention was that not that article, but the 97th article was applicable.

The 97th article prescribes three years from "the date of the failure, as the period of limitation for suits "for money paid upon" existing consideration which afterwards fails.

The material portion of the judgment of the High Court was as follows:—

"The suit has been dismissed on the ground that it is barred

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by sect. 43 of the Code of Civil Procedure, inasmuch as it is said that, under that section, this claim might have been and ought to have been inserted as an alternative claim in the former suit. What the section says is, that the plaintiff shall include in his suit the whole of the claim which he is entitled to make in respect of the cause of action; and if he omits to do this, he shall not be competent to bring another suit in respect of the portion omitted. It appears to me very clear that the present claim is in respect of a totally different cause of action from that raised in the former suit. The former suit was based upon an alleged title to the land, and was a suit to recover possession of the land on the strength of that title. The present suit is based upon the fact that there was no title, and upon the fact that in return for the consideration-money paid by the plaintiff, he got nothing in return, as it now turns out. So far, therefore, as concerns the ground upon which this suit has been dismissed, I cannot agree with the Lower Court. But I think that the suit must, nevertheless, be dismissed on another ground, viz., that it is barred by limitation.

"It appears to me clear, that the case is governed by article 62 of the Second Schedule to the *Limitation Act*, which deals with the case of money received by the defendant for the plaintiff's use. This was money received to the plaintiff's use by reason of the fact that the consideration for which he paid it wholly failed; and I cannot resist the conclusion that the failure of consideration was a failure from the beginning; that the money was, from the first, money paid without consideration, although no doubt the failure of consideration was not manifest at the time, and only became apparent when the former suit was brought and failed."

Doyne, for the Appellant, contended that the suit was not barred by sect. 43 of the Civil Procedure Code, as held by the First Court, but that the judgment of the High Court was right upon that point. Secondly, it was not barred under article 62 of the Act of 1877, for it was not a suit to recover money payable by the Respondents or by *Doulut Mandar* as money received to the Appellant's use. Thirdly, article 97 was applicable, and according to that article the period of limitation ran from

the date when the consideration subsequently failed. That date was either that of the High Court decree or that of the District Judge, either of which was within three years of action brought. The consideration did not fail until the suit for relief failed, and the objecting co-sharers finally succeeded. [SIR RICHARD COUCH:—Was not your cause of action complete when you failed to get possession?] Finally, if neither article 62 nor article 97 applied, article 120 would be applicable, and the suit would be in time. The debt due by *Dowlut Mandar* to the Appellant at the time of his death is payable by his sons out of and to the extent of the joint estate, which belonged to their father in his lifetime and to his sons jointly.

The Respondents did not appear.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 1st of August, 1879, one *Dowlut Mandar*, the father of the Respondents, sold to the Appellant two and a half annas out of eight annas of a certain property, and the consideration was then paid by the Appellant. On the 1st of April, 1881, and after the death of *Dowlut Mandar*, the Appellant filed a plaint, in which he stated that after the purchase he had applied to the collector for registration of his name in respect of the two and a half annas which had been so sold to him; that his application was opposed on the part of two of the members of the joint family, of which *Dowlut Mandar* was the head; and that in consequence of that opposition the Court rejected his petition for registration of his name on the 22nd of December, 1880; and treating that as giving him a cause of action for a suit to recover possession, he asked in the plaint that possession might be given to him. The Subordinate Judge of *Bhagulpore* decreed the suit; the District Judge dismissed it; and on appeal by the Appellant to the High Court that Court dismissed the appeal. On the 4th of March, 1885, the Appellant commenced a suit for the recovery of his purchase-money and interest. The Second Subordinate Judge of *Bhagulpore* dismissed this suit on the ground that it was barred by sect. 43 of the Civil Procedure Code.

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The High Court, on appeal from the Subordinate Judge, held the suit to be barred by the Law of Limitation, apparently under the 62nd article of the Second Schedule to the *Limitation Act*. There are two articles in that schedule which it has been said may be applicable to the present case. The 62nd article provides that, in a suit for money had and received, the period of limitation runs from the time of the money being received. The 97th article applies to a suit to recover money upon an existing consideration which afterwards fails, and it says that the period of limitation is to date from the time when the consideration failed. Their Lordships are of opinion that the case must fall either within article 62 or article 97. If there never was any consideration, then the price paid by the Appellant was money had and received to his account by *Dowlut Mundar*. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the Appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time, to recover back his purchase-money upon a failure of consideration; and, therefore, the case appears to them to be within the enactments of article 97.

It appears to their Lordships unnecessary to give any opinion upon the other question which was decided by the High Court and the Subordinate Court, the High Court differing from the latter, namely, whether the Appellant ought, in his suit brought in 1881, to have included a claim to recover back the purchase-money. It may be a question of some difficulty in a case of this kind as to what is the effect of sect. 43 of the Civil Procedure Code. Their Lordships consider it is unnecessary for them to give any opinion upon that, and they abstain from doing so. Upon the question of limitation they are of opinion that the decree of the High Court ought to be affirmed, and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

Solicitors for Appellant: *T. L. Wilson & Co.*

MAHARAJA JAGATJIT SINGH . . . . PLAINTIFF;

AND

RAJAH SARABJIT SINGH (A MINOR BY HIS NEXT FRIEND) . . . . . DEFENDANT.

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1891
Nov. 6, 21.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Law of Oudh—Proceedings in Execution—Res judicata—Limitation—Civil Procedure Code, ss. 13, 42, 43—*Mesne Profits.*

A decree in 1873 awarded to the Appellant certain lands as belonging to village *A*. Possession was given in September, 1876, the lands having been judicially ascertained but not demarcated. In 1877 he sued the Respondent in the Civil Court for possession of alluvial lands as belonging to village *B*., and included therein some land already decreed to him belonging to village *A*., but the suit was dismissed. He then sued in the Revenue Courts, with the result that the exact lands adjudged under the decree of 1873 were demarcated and the respondent was found to be in possession of part thereof, but denied the jurisdiction of the Revenue Courts to oust him. In February, 1886, the Appellant sued for possession of certain lands belonging to village *A*., and adjudged to him by the decree of 1873.

Held, that this suit was not barred by limitation, for the judicial ascertainment of the lands in September, 1876, was the earliest date at which the right to sue accrued:—

Held, further, with regard to part of the land, that though it was shewn to have been included in the suit of 1877 the decree dismissing that suit did not under sect. 13 Civil Procedure Code, bar its recovery. No issue relating to it had been heard and finally decided in that suit, except that on survey it was found to belong to village *A*. and was therefore excepted from that suit and was governed by the decree of 1873:—

Held, further, with regard to the remainder, that the suit was not barred by sects. 42, 43, by reason of its not having been included in the suit of 1877.

Inquiry as to mesne profits directed under sect. 212 Civil Code Procedure.

APPEAL from a decree of the Judicial Commissioner (Oct. 18, 1886), modifying a decree of the District Judge of *Lucknow* (March 1, 1886), which dismissed the Appellant's suit.

The object of the Appellant's suit was to recover possession

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD MORRIS, SIR RICHARD COUCH, and MR. SHAND (LORD SHAND).

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of 2679 bighas of land belonging to his village of *Tappah Sipah*, for which he had obtained a decree against the Respondent, on the 3rd of February, 1873. He alleged that he had previously obtained delivery of possession in execution of that decree, but had been, in part, subsequently dispossessed, and a cloud cast on his title as to the whole, by the intervention and claim of the Respondent, in certain rent suits brought by the Plaintiff against tenants of portions of those lands. The result of that intervention and claim was, that the Plaintiff was referred by the local Courts, under the *Oudh Rent Act* XIX. of 1869, s. 111, to a regular suit to prove his title, and he accordingly brought the present suit on the 5th of February, 1886.

The Respondent's case was that no actual possession had been given to the Appellant or his predecessors in title under that decree, and that the present suit was barred by limitation. He also contended that the suit was barred as to part of the said lands under sect. 13 Civil Code Procedure, 1882, because the same had been included in a suit brought in 1877 and dismissed. Further, that the suit as to the remaining portion of the lands, was barred under sects. 42, 43, because the same had not been included in the suit of 1877.

The facts of the case, and the proceedings in Court, which took place prior to this suit, are detailed in the judgment of their Lordships.

The District Judge held that the suit was not barred by limitation, but that as to part of it, viz., as to 1226 bighas, it was barred, as the Respondent contended, under sect. 13, and as to the remainder by sects. 42, 43, and accordingly dismissed the suit.

The Judicial Commissioner concurred with the first Court in holding that the suit was not barred by limitation, and that as to the 1226 bighas it was barred under sect. 13 as *res judicata*. But he differed from the Lower Court with respect to the remainder of the lands, and held that with regard to them the suit was not barred by sects. 42 and 43. He, however, refused any decree for mesne profits of the lands in respect of which he granted a decree, on the ground that there was no evidence before him to shew that mesne profits were due and because

there had been supineness in executing the decree of February, 1873.

The material portion of the Judicial Commissioner's judgment is as follows:—

The practical questions for the Courts are (1.) can the lands given by the orders of 1873, 1874, and 1876 to Plaintiff be now ascertained?

(2.) Has Plaintiff by any action on his part debarred himself from obtaining further relief from the Civil Courts, in respect of any of such lands, and, if so, in respect to what lands is he so debarred?

In reply to the first question I think there is no sort of doubt that notwithstanding the fact that since this long litigation commenced the main channel of the *Gogra* has shifted considerably to the north, nevertheless the lands given to Plaintiff in 1874 and detailed in the map of June, 1874, are capable of identification.

A comparison of the map A 10 in the record of 1878, of District Judge's Court with map marked Exhibit (1) in the file No. 56, decided by Mr. *Blennerhassett* on the 28th of April, 1884, and the map No. 23, dated the 16th of June, 1874, will sufficiently explain to a person conversant with surveying, what the land was which was given to Plaintiff in 1873–74 and its present locality. As to the second question, I agree with the Lower Court that the decision of the Judge in *Khurram Rae's Case*, bars the present claim as far as regards 1226 bighas of that claim. For those 1226 bighas were comprised in the claim made in that suit, and that claim was decided on the merits and was wholly dismissed. The mere fact that Plaintiff then claimed it on an incorrect allegation that it was an accretion of his village of *Khasapur*, seems to me immaterial.

The material point is that he claimed possession of it and his claim was disallowed.

Nor can I allow the contention that the present Minor raja ought not to be bound by *Khurram Rae's* action. It seems to have been the ordinary practice of the Maharaja of *Kapurthala* to bring suits relating to the *Kapurthala* estate in his agent's name, and in the very case before us Plaintiff is seeking to benefit by a decision (3rd February, 1873,) given in a case so

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brought on behalf of the *Kapurthala* estates by a manager, *Dewan Banna Mal.*

In fact, the very foundation of the present claim is the decree given in that case. So in the 1877 *Case, Khurram Rae,* the ostensible plaintiff, was acting for the *Kapurthala* estates as much in the minor's time as in that of the minor's father.

For these reasons, I am of opinion that sect. 13, Civil Procedure Code, bars the present suit as regards 1226 bighas.

The Lower Court has held that the suit as regards the rest of the land claimed is barred by sects. 42, 43 Civil Procedure Code. The grounds for this conclusion are not clear to me. The Lower Court has assumed that Plaintiff has never had more than formal possession over *any* part of the decreed land.

But I do not find proof on the record to this effect. The Defendant himself frequently limits himself to a declaration that Plaintiff is not in possession of *all* the land claimed, and Plaintiff on several occasions has framed his prayer that his possession be confirmed where it exists, and that possession be granted where not existing. At the time that the 1226 bighas were claimed by Plaintiff there is no clear evidence proving in respect to what other plots Plaintiff was then dispossessed, and how and since what time. All these points had to be proved distinctly before it could be rightly decided that Plaintiff at the time he sued for the 1226 bighas had also a cause of action for other plots and had failed to sue on such causes of action. Again, seeing that Plaintiff had obtained formal possession from the Civil Court in 1876, any person remaining on the land so given to Plaintiff without Plaintiff's permission was a mere trespasser or squatter, and until Plaintiff had demanded his rent from such person there was nothing to shew that payment would have been refused. Until such refusal to pay rent occurred, Plaintiff himself alleges that he had no clear cause of action against the said tenant and his abettors. I think this contention is valid. For these reasons, I disapprove of the finding of the Lower Court that this suit is barred by sects. 42 and 43.

Nor do I think that the suit is barred by reason of the adverse possession of Defendant for more than twelve years. And this for two reasons:—

First, because though there are vague (often conflicting) statements as to the length of time that Defendant has by his tenants held possession of portions of his land, there is nothing definite or precise either as to particular plots, or tenants, or periods.

And again in any case the formal possession given to Plaintiff in 1876, appears to me to clearly bring him within Limitation.

For these reasons I modify the judgment below, and decree to Plaintiff the land sued for less 1226 bighas pakka, respecting which I hold that (under sect. 13, Act XIV., 1882), the Plaintiff's claim is barred by the judgment of Colonel *Chamier*, Deputy Commissioner, *Bara Banki*, dated the 2nd of April, 1878.

As to mesne profits, no evidence exists whatever to shew that such are due; and moreover the extraordinary supineness for years exhibited by the Plaintiff (Appellant) after the decree of 1873, disentitles him to any relief under this head. I dismiss this portion of the claim.

Doyne, for the Appellant, contended that this judgment was wrong except so far as it reversed the decree of the district Judge. All the lands in this suit were covered by the decree of 1873. That decree and the proceedings taken in execution of it both before and after the suit of 1877, precluded the Respondent from disputing the Appellant's title to any portion of the lands comprised therein. As regards the suit of 1877 so far as the 1226 bighas now in suit were included therein it was not with a view to try the title thereto, but from mistaken identity they were treated by the Plaintiff as being an accretion to the village *Khasapur*, and were excepted by the Court from the operation of that suit when it was discovered that the lands in reality belonged to *Tappa Sipah*. No issue arising in the present suit was directly and substantially in issue in the suit of 1877 or was decided thereby: see sect. 13 of the Code of Civil Procedure. Further, there was no reason why the Appellant should not have been declared entitled to mesne profits. Inquiries should have been directed under sect. 212 or sect. 244 of the Code of Civil Procedure or otherwise as should have appeared necessary for the ascertainment of the same.

The Respondent did not appear.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The Appellant is the raja of *Kapurthala*, and the proprietor of estates in *Oudh* on the banks of the *Gogra* river. The Respondent is the raja or talookdar of *Ramnagar*, and the proprietor of estates on the other side of that river. There has been litigation between the two houses extending over many years. The present dispute commenced in the year 1871, when the Appellant's father was living; but his death has not, except on one point not necessary to decide or state now, affected the question. There have been suits and cross-suits, appeals and cross-appeals, petitions and cross-petitions, sometimes by agents, and sometimes by principals, and the parties have interchanged places on the record so often that it is confusing to speak of them in the character of Plaintiffs or Defendants. It will perhaps be clearer to call the Appellant's side *Kapurthala* and the Respondent's *Ramnagar*.

In the month of December, 1871, *Kapurthala* brought a suit against *Ramnagar* to assert his title to a tract of land on the banks of the *Gogra*; and in January, 1872, *Ramnagar* brought a cross-suit against *Kapurthala* in respect of the same land. After a while the parties came to a compromise, which was expressed in a decree dated the 3rd of February, 1873, and pronounced by Colonel *Chamier*, the then Deputy Commissioner of *Bari Banki*, in whose Court *Ramnagar's* cross-suit was pending. The terms of the compromise were to the following effect. Part of the land in dispute was to be attributed to *Kapurthala's* village, *Tappa Sipah*, according to the Revenue Survey map; another part was to be attributed to *Ramnagar's* villages, *Para* and *Deorya Tilkunia*, according to the same map; the remainder was to be apportioned rateably to the villages above named.

In December, 1873, an order was made in the execution proceedings, ascertaining the acreage apportionable to each village; and it seems that *Ramnagar* was disappointed with the result, considered that he had been outwitted in the transaction, and began to offer opposition to the execution of the decree. In point of fact he has successfully resisted its execution from that day to this—a state of things which appears to their Lordships

to suggest grave doubts as to the efficiency of legal processes in *Oudh*.

After this point the execution proceedings dragged slowly on. It is not necessary to detail them. A map was made and signed by Colonel *Chamier* in June, 1874. In April and June, 1876, orders were made for possession, and on the 27th of June, 1876, a receipt of possession was signed by *Kapurthala's* agent, and the long dispute appeared to be finally decided on the 1st of September, 1876, when Mr. *Wood*, then Deputy Commissioner of *Bara Banki*, pronounced an order as follows:—

"After hearing the objections of the pleaders on both sides, the Court decides that the decree must be executed according to the map prepared by Colonel *Chamier*, dated the 16th of June, 1874, and the southern boundary of the disputed land will be that drawn in the above map. If either party consider that they have any claim to lands thrown up by the river, they have their remedy by a regular suit.

"This Court cannot go contrary to the map prepared by Colonel *Chamier*. The parties have been informed of this order, and as the decree, from the report of the Extra Assistant Commissioner, has now been executed, the papers will be consigned to the Records."

A controversy then arose respecting alluvial land, which *Kapurthala* alleged to belong to another of his villages called *Khasapur*. In one of the execution proceedings, a petition of the 27th of June, 1876, a statement was made on behalf of *Kapurthala* to the effect that *Khasapur* land had by error been mixed up with *Tappa Sipah* land. Probably Deputy Commissioner *Wood* was referring to that statement, when he spoke of a regular suit being brought for lands thrown up by the river. However that may be, *Kapurthala* did, on the 16th of January, 1877, bring a fresh suit, the proceedings in which must be accurately stated, because the main question now to be decided is whether the decree does not exclude a large portion of the relief sought in the suit now under appeal.

The claim made was for possession of 3921 bighas, 18 biswas, village *Khasapur*, on the basis of ancient possession, by cancelment of possession wrongfully taken by the Defendant since the

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month of June, 1876. The record does not shew what issues were settled, which is a defect, because the judgment of the Court is framed by reference to them. But the language of the judgment shews clearly enough to what they must have been confined. The case was heard on the 2nd of April, 1878, before Colonel *Chamier*, who was again Deputy Commissioner of *Bara Banki*. In giving judgment he said:—

"The plaint set forth that the land belonged to *Khasapur*, but after a survey of the land the Plaintiff discovered that he must abandon this contention, inasmuch as he holds land between *Khasapur* and the land in suit, under a decree in a former suit, when it was assigned to *Tappa Sipah*, another of his villages. . . . . It is quite clear from the map, the correctness of which has not been impugned by either party, the Plaintiff has no business south of the *Gogra* under his ownership of the village of *Khasapur*. The fact appears to be that there is some doubt as to the exact land decreed to *Tappa Sipah*, and therefore Defendant applied for an Amin to point it out, but the Plaintiff asked that it might be postponed until this suit might be determined. But be that as it may, Plaintiff cannot complete his possession under the *Tappa Sipah* decree by tacking on land to *Khasapur*."

After these observations the learned Judge proceeds to state his findings on the several issues. The material ones are:—

"On the second issue I find that this suit cannot be maintained for land alleged to belong to *Khasapur* when land decreed to *Tappa Sipah* intervenes.

"On the third issue I find by an examination of the present map A with the maps of the Revenue Survey, that the greater portion of land marked B in red is the exact site of the Defendant's villages *Durgapur* and *Sissounda*, and therefore it would be manifestly impossible to decree the land shewn in green to Plaintiff. In my opinion the claim is without any fair foundation.

"Plaintiff should take steps to have the land defined which has been decreed to him under *Tappa Sipah*, and this judgment of course will not affect any of that land."

And on these findings he dismissed the plaint.

Kapurthala appealed to the Commissioner of *Lucknow*, Colonel *Reid*, who, on the 20th of June, 1878, dismissed the appeal. In so doing he made the following observations:—

"The facts appear to be as set forth by the District Judge in his judgment, and I agree with him that the claim, as laid, is quite untenable.

"But the District Judge himself remarks that there is some doubt as to the exact land decreed to proprietor *Sipah*, and I am therefore of opinion that, on an assign (probably a misprint for application) to that effect being made by *P. H. Appellant*, the District Judge should proceed to the spot and satisfy himself by local inquiry, in presence of the parties, that his decree has been proper, land has been assigned to *Tappa Sipah* exactly in accordance with his decree."

After this *Kapurthala* (who indeed was a little child, but their Lordships speak of the acts of principals and agents as all due to the principals) addressed himself to the Sisyphean task of executing the decree of the 3rd of February, 1873. On the 11th of October, 1878, he addressed the Deputy Commissioner, praying "that proceedings may be taken as directed by the Commissioner of *Lucknow* in his order dated the 20th of June, 1878. A clear determination of boundaries will probably put a stop to all litigations." It is apparently to this application that the order which stands next in the Record relates. It was made by the Deputy Commissioner, Colonel *Chamier*, on the 3rd of March, 1879, and is as follows:—

"This is another file which Mr. *Harington* has not touched during his three months' incumbency. It is impossible now to take it up this season. It seems to me that, before the Raja of *Kapurthala* can expect the Court to ascertain whether or no a decree passed years ago was accurately executed or not, he should state the section of Act X., 1877, under which he applies, and he should present an accurate map of the land shewing what he is entitled to under the decree, and what he does not hold.

"Papers to be filed."

Their Lordships cannot refrain from observing that this appears to them a very unsatisfactory way of dealing with such

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a business. The land to which *Kapurthala* was entitled under the compromise was not ascertained and put beyond the reach of dispute till September, 1876. In the suit of 1877 it appeared that there were still some doubts as to the exact land, and in the final judgment given in that suit, on the 20th of June, 1878, it was intimated to *Kapurthala* by the Commissioner, Colonel *Reid*, that on his application the District Judge should proceed to the spot, and satisfy himself that the land had been assigned to *Tappa Sipah* in accordance with his decree. The District Judge and the Deputy Commissioner appear to be one and the same officer. In October, 1878, *Kapurthala* asks the Deputy Commissioner to do what Colonel *Reid* said he ought to do. And then, after five months' delay, not imputed to *Kapurthala* but to Mr. *Harington*, he is told that his decree was passed years ago, and that, before anything can be done, he should state under what section he applies, and present an accurate map of the land shewing what he is entitled to, and what he does not hold. Now, when *Kapurthala* made this application, the land had been finally and effectually ascertained barely more than two years. The Court was in possession of the map of 1874 (Colonel *Chamier's* own map), which the Courts had taken as conclusive. The execution sections of the Code, if unknown to the Deputy Commissioner, could have been referred to at once. What *Kapurthala* was entitled to was the land awarded him by the decision resting on the map of 1874. What he had not got in actual possession was the matter to be ascertained by the Deputy Commissioner or his officers, and was in fact ascertained by his successor in the course of a day's visit to the spot.

It is not very surprising that, after this repulse in the Civil Court, *Kapurthala* should have tried whether he could get assistance from the Revenue Court. On the 28th of January, 1880, he procured an order for the erection of boundary marks, according to the decree of February, 1873. *Ramnagar* appealed, but though his appeal was dismissed, nothing effectual was done till the 2nd of February, 1881, when Mr. *Forbes*, Deputy Commissioner, visited the spot, ascertained the boundary line adjudged under the decree, and ordered pillars to be erected. At the same time he found that the adjudged land, within certain lines

which he laid down on a map, was in the possession of *Ramnagar*, who strongly urged his right to remain in possession until ousted in due execution of the Civil Court decree, and denied the right of the Revenue authorities to lay down boundaries except on the basis of actual possession. The boundaries, however, were laid down on the 11th of August, 1881, as appears from an order of that date.

Kapurthala's next step was to bring rent suits against tenants who paid their rent to *Ramnagar*. He got decrees on the 19th of June, 1882, from the Extra Assistant Commissioner, against the tenants, and notwithstanding the intervention of *Ramnagar*. But on appeal it was decided that the question was not within the competence of a Revenue Court, but should appropriately be decided in a Civil Court. This decision was upheld by the Judicial Commissioner, who by order dated the 14th of October, 1882, dismissed *Kapurthala's* appeal, saying, "I quite agree with the Deputy Commissioner; if the Appellant has any claim to the land he should sue *Rajah Surabjit Singh* in the Civil Courts."

It appears to their Lordships that those decisions were right, but their effect was to throw *Kapurthala* back again upon the Civil Courts. After two failures, owing to want of proper formalities, and much loss of time in consequence, the plaint in the present suit was presented and received on the 5th of February, 1886. It claims 2679 bighas, 14 biswas of land, under the decree of February, 1873.

The first question, going to the entire suit, is whether it is barred by time. Both of the Courts below have decided this point in favour of *Kapurthala*, and their Lordships concur with them. It is true that the compromise which is the foundation of the claim dates from February, 1873, but the land which accrued to *Kapurthala* under the compromise was not ascertained till the proceedings in 1876. Therefore, without considering the effect of any of the subsequent litigation, June, 1876, is the very earliest time at which a right to recover the land in suit accrued to *Kapurthala*, and that is less than twelve years before the reception of the plaint.

The Deputy Commissioner, Colonel *Newberry*, dismissed the

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suit with costs. As to 1226 bighas 6 biswas, he considered that the dispute had been previously decided in the suit of 1877, by the decree of the 2nd of April, 1878. As to the rest of the land claimed, he held that the case fell within the sections of Civil Procedure Code (42 and 43) which relate to the splitting of claims.

On appeal by *Kapurthala* the Judicial Commissioner affirmed the decree, so far as it relates to the 1226 bighas 6 biswas comprised in the suit of 1877. But as to the rest of the claim he varied the decree, and decided for *Kapurthala*. In the latter part of the Judicial Commissioner's decree their Lordships entirely concur, and as there is no appeal from it by *Ramnagar* they need not further examine that part of the case. But *Kapurthala* now appeals from the rest of the decree, and the question is whether it can be maintained.

Both the learned Judges grounded their opinion on the fact that the tract of land claimed in 1877, being 3921 bighas, included the 1226 bighas belonging to *Tappa Sipah*, and that the claim was dismissed. That, they say, is conclusive. The Judicial Commissioner says the mere fact that *Kapurthala* claimed it as belonging to *Khasapur* is immaterial. And as to the direction given by the Courts to have the *Tappa Sipah* lands defined, the Deputy Commissioner says it is the decree which contains the formal adjudication, and it is not possible to amplify the decree from the judgment. But the fact that *Kapurthala* in 1877 claimed the whole tract as belonging to *Khasapur*, and that, when part was found not to belong to *Khasapur* but to another of his villages he was left to recover it in another way, may be very material. And when a decree simply dismisses a suit, it is necessary to look at the pleadings and judgment to see what were the points actually heard and decided.

Sect. 13 of the Civil Procedure Code does not enact that no property comprised in a suit which is dismissed shall be the subject of further litigation between the parties. What it does enact is that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, and has been heard and finally decided. Was then the title to *Tappa Sipah* lands put

in issue by the suit of 1877, and was it heard and finally decided against *Kapurthala*?

The proceedings have been stated above at some length. Their Lordships will recapitulate them. *Kapurthala* claimed a large area as belonging to *Khasapur*. Whether land belonging to *Tappa Sipah* was included in that area in mistake, or in the hope of getting some advantage in the other dispute, does not appear. It must be remembered that far the greater portion of these disputed lands is still uncultivated and jungle. Anyhow, the fact was discovered by a survey made in the suit of 1877; it appeared that doubts had been raised as to the position of the land decreed to *Tappa Sipah*; *Ramnagar* asked for an Amin to point it out, but *Kapurthala* preferred to have the suit decided first. The decision is that the land not belonging to *Tappa Sipah* belonged to two of *Ramnagar's* villages, rather more, apparently, than two-thirds of the whole. But it is clear that the moment land was shewn to belong to *Tappa Sipah*, it was considered as out of the suit. Both Courts treat it so, and both Courts direct *Kapurthala* to get the *Tappa Sipah* land ascertained. Their Lordships cannot see what matter respecting *Tappa Sipah* was in issue between the parties, or what was heard or decided. It seems to have been the express intention of both Courts to decide nothing about *Tappa Sipah*. Yet, according to the view now put forward, the moment that this suit was dismissed *Kapurthala* was deprived of all right to recover those 1226 bighas, and was incompetent to take the proceedings which the Courts contemplated.

The only remaining point is that of mesne profits. The Deputy Commissioner says there is no proof. There is some proof, because the rent suits shew that *Ramnagar* was receiving rent for some of the land. But it is quite competent for the Court to direct an inquiry under sect. 212 of the Code. *Ramnagar* has for a number of years kept *Kapurthala* out of property which clearly belonged to him, and it would be a denial of justice not to make him account for the profits. The Judicial Commissioner says that *Kapurthala* ought not to have any mesne profits, because of his extraordinary supineness for years. To their Lordships it seems that *Kapurthala* has been constantly

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endeavouring, through great discouragements, and sometimes by mistaken proceedings, but with no great intervals of time, ever since February, 1873, to get the land which he was entitled to under that decree, and that *Ramnagar* has been thwarting him by every device in his power, with a success which is very lamentable: and that, even if supineness could be properly treated as equal to a bar by lapse of time, there is in this case no supineness which affords a reason for leaving *Ramnagar* to enjoy the fruits of his illegal and wilful holding on to land not his own.

Their Lordships are of opinion that both the decrees below should be discharged, and that a decree should be made for the Plaintiff for possession, according to the prayer of his plaint, and for mesne profits, with an inquiry as to the amount. Whether this decree will be more fruitful in results than former ones have been their Lordships cannot tell, but it is to be hoped that the *Oudh* Government will see its way to give suitors what the Courts of law award to them. The Plaintiff should also have the costs of suit in the First Court, and of the appeal before the Judicial Commissioner, and the costs of this appeal. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

Solicitors for Appellant: *Barrow & Rogers.*

END OF VOL. XVIII.

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ARBITRATION AND AWARD.] In a suit by two sons of a deceased Mahomedan to recover their shares in their father's estate from their brother, the Defendant pleaded that he was entitled to the said estate under an award in his favour made on a submission to which the Plaintiffs were parties; but it appeared that the Civil Court had refused an application under sect. 525 of the Civil Procedure Code to file the same:—*Held*, that this order was not a decision as to the validity of the award within the meaning of sect 13.—Where a dispute relating to land and the right of succession thereto was referred by the members of a Mahomedan family to a private arbitrator selected by reason of his knowledge of the circumstances of the family, without any stipulation that he was to be controlled in his decision by any custom or Mahomedan law, and the arbitrator decided on the broad view of giving effect to what he conceived to be the intention of the deceased father of the parties:—*Held*, that this could not be relied on as misconduct, and that such decision was within the right of the arbitrator. MUHAMMED NAWAZ KHAN *v* ALAM KHAN - - - - - - 73

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